No. 6

IN THE

Supreme Court of the United States

October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Columbia

APPELLANTS' BRIEF

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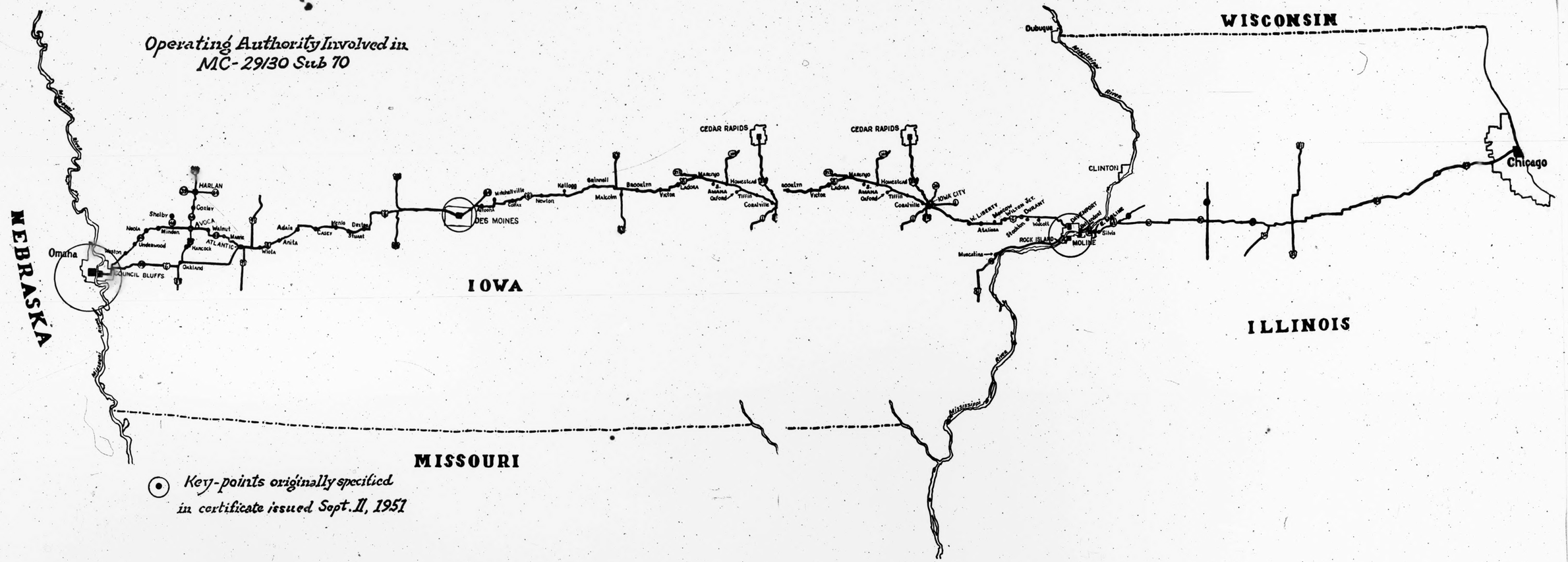
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OPINION BELOW

The opinion of the United States District Court for the District of Columbia (R. 192) is reported at 144 F. Supp. 365. The report of the Interstate Commerce Commission (R. 93) appears at 63 M. C. C. 91.

JURISDICTION

The judgment of the District Court (R. 195) was entered on January 27, 1956, and notice of appeal (R. 197) was filed on March 23, 1956. Probable jurisdiction was noted by this Court on October 8, 1956. (R. 204), 352

U. S. 816, 77 S. Ct. 36. Jurisdiction to review the decision on direct appeal is conferred upon this Court by Sections 1253 and 2101(b) of the Judicial Code, 28 U. S. C. §§1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §1, and Sections 5(2)(a), 5(2)(b), 206, 207, 208(a) and 212 of the Interstate Commerce Act, as amended, 49 U.S.C. §§5(2)(a), 5(2)(b), 306, 307, 308(a) and 312, are set forth verbatim in Appendix A hereof.

QUESTIONS PRESENTED

1. Whether the record before the Interstate Commerce Commission in Docket No. MC-29130 (Sub-No. 70), *The Rock Island Motor Transit Company Common Carrier Application,* fails to support the Commission's report and order authorizing unrestricted motor-carrier operations by the Rock Island Motor Transit Company, a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, between the points directly involved, as well as between points throughout a much broader territory not directly involved in the proceeding before the Commission?

It is appellants' contention that the record before the Commission is totally devoid of evidence to support a need for service between the major points involved.

2. Whether, in any event, the Interstate Commerce Commission, in authorizing the performance of motor-carrier service by railroads or their affiliates, is required by the provisions of the Interstate Commerce Act and the National Transportation Policy to limit the motor service to be rendered to that which is auxiliary to or supplemental of the rail service of the parent railroad?

It is appellants' contention that the Congressional policy permits no exceptions, and that the Commission has no discretion to deviate therefrom.

3. Whether the Interstate Commerce Commission, after authorizing the performance of restricted motor-carrier service by a railroad affiliate over routes acquired by purchase under Section 5 of the Interstate Commerce Act, 49 U. S. C. §5, lacks the power to void such restrictions and authorize the performance of an unlimited motor-carrier service over the same routes through approval of an application subsequently filed by the same rail affiliate under Section 207 of the Interstate Commerce Act, 49 U. S. C. §307?

The last question was dealt with in complete detail, both in brief and on oral argument before the lower court, by counsel for the rail labor groups, intervening plaintiffs below. As they can be expected to develop it fully before this Court, these appellants will not further treat with it herein.

STATEMENT

This is the first case, in the more than twenty years of federal regulation of motor carriers, in which this Court has been called upon to determine the perimeter of the Commission's power to authorize the performance of unlimited truck service by a railroad or its subsidiary. In all previous cases, with unimportant exceptions, the Commission has restricted the authority granted in order to assure that the motor service rendered would be limited to operations auxiliary to, or supplemental of, the train service of the railroad. The case at bar represents, for the first time, a complete abandonment by the Commission of its duty to protect the public interest in an independent motor-carrier industry through the imposition of restrictions upon rail operation of motor vehicles. And in so doing, as will be more fully developed

later, the Commission has abruptly reversed its interpretation of the statutory safeguards enacted by Congress to assure the continued development and preserve the inherent advantages of an independent motor-carrier system. This violation of Congressional policy creates the novel question here presented. Not only does it do violence to the Commission's consistent interpretation, but it overrules what this Court decided, at least inferentially, in the *Rock Island* and *Texas and Pacific* cases, *infra.*

Much of the history of this proceeding was recited by this Court in its 1951 decision in the *Rock Island* case, *infra,* at 340 U. S. 421-430, 71 S. Ct. 385-389. Its repetition herein is for the sake of convenience and continuity.

The Commission Approved the Purchase of White Line for Restricted Operations.

The controversy herein can be said to have originated twenty years ago, when the Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad subject to part I of the Interstate Commerce Act, 49 U. S. C. §1 *et seq.,* became interested in conducting motor-carrier operations paralleling its lines between Chicago, Illinois, and Omaha, Nebraska. Through a subsidiary company, The Rock Island Motor Transit Company, the railroad on October 13, 1937, filed an application with the Interstate Commerce Commission for authority under Section 213 (now Section 5 of the Interstate Commerce Act, 49 U. S. C. §5) to purchase certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, motor carriers of property subject to part II of the Act, 49 U.S.C. §301 *et seq.,* hereinafter collectively called White Lines. In its report conditionally approving the purchase, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.,* 5 M.C.C. 451, dated April 1, 1938, the Commission, Division 5, after referring to the considerable testimony that had been of-

fered to show how the correlation of truck-and-rail service over the routes would be effected, found, as required by statute (formerly §213, now §5(2)(b)), that the purchase would promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations and would not unduly restrain competition. Nevertheless the Commission expressly conditioned the authority granted "to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition." *Id.*, at 5 M.C.C. 458. The certificate, authorizing operations between Silvis, Illinois, and Omaha, Nebraska, and containing the foregoing reservation, was issued to Motor Transit on December 3, 1941.

The Commission Approved the Purchase of Frederickson for Unrestricted Operations.

Subsequently, on November 28, 1944, in *Rock Island M. Transit Co.—Purchase—Frederickson,* 39 M.C.C. 824, the Commission, Division 4, approved the purchase by Motor Transit of motor-carrier operating rights between Atlantic, Iowa, an intermediate point on the White Lines route, and Omaha, that would permit future truck operations by Motor Transit to follow the line of the railroad much more closely than had the previously-acquired routes. However, the report did not confine Motor Transit to auxiliary and supplemental service. Because of the inconsistency of having truck operations over one route restricted and those over an alternate route unrestricted, the Commission, on February 5, 1945, before the Frederickson certificate was issued, ordered both finance proceedings and the applicable compliance docket reopened for reconsideration.

The Commission Reconsidered Both Cases and Restricted the Combined Operations.

The Commission on reconsideration issued a comprehensive report, *Rock Island M. Transit Co. — Purchase — White Line M. Frt.*, 40 M.C.C. 457, dated March 4, 1946, wherein it found that the White Lines certificate should be amended and the Frederickson certificate restricted so as to require that all future operations conducted thereunder should be subject to five express conditions insuring auxiliary and supplemental service. Following this report Motor Transit petitioned for reconsideration, and on June 9, 1947, the Commission reopened the proceedings for further hearing. The report of the Commission on further hearing, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 55 M.C.C. 567, dated April 11, 1949, affirmed the prior report, including the imposition of the auxiliary and supplemental restrictions.

Thereupon Motor Transit filed a complaint in the U. S. District Court for the Northern District of Illinois, Eastern Division, and in *Rock Island Motor Transit Co.* v. *United States*, 90 F. Supp. 516, decided November 29, 1949, the three-judge court set aside the Commission's report and order.

The Supreme Court Upheld the Restrictions.

On appeal this Court reversed the decision of the District Court and sustained the Commission's imposition of the auxiliary and supplemental restrictions. The Court in its decision of February 26, 1951, in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 71 S. Ct. 382, agreed with the Commission that, under the circumstances, it was required to restrict the motor-carrier operating rights acquired pursuant to the provisions of Section 213 to the rendition of service auxiliary to, and supplemental of, the rail service of the railroad. Rehearing was denied by this Court on April 9, 1951. *United States*

v. *Rock Island Motor Transit Co.*, 341 U. S. 906, 71 S. Ct. 609.

The Commission Granted Temporary, then Permanent, Unrestricted Rights.

The certificate with the auxiliary and supplemental restrictions attached was issued to Motor Transit on September 11, 1951.[1] In the meantime, however, Motor Transit had applied for and had been granted temporary authority under Section 210a of the Interstate Commerce Act, 49 U. S. C. §310a, to operate over virtually identical routes to those it had acquired through the White Lines and Frederickson purchases under somewhat less restrictive conditions than those contained in the certificate issued September 11, 1951.[2] On October 26, 1951, Motor Transit filed an application under Section 207, 49 U. S. C.

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[1] The certificate was limited by the following restrictions:

1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company.

2. The Rock Island Motor Transit Company shall not render any service to, or from; or interchange traffic at any point not a station on the rail line of The Chicago, Rock Island and Pacific Railway Company.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between the Rock Island Motor Transit Company and The Chicago, Rock Island and Pacific Railway Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

[2] The temporary authority was limited to shipments of 2,000 pounds (later increased to 5,000 pounds), and certain key-point restrictions were imposed.

§307, for permanent authority to perform unrestricted motor carrier operations over the pertinent routes. Hearings were held in this proceeding, docketed as No. 29130 (Sub-No. 70), on March 18 through April 21, 1952, and on May 20, 21, and 22, 1952, at Des Moines, Iowa. Almost a year later, on April 21, 1953, the examiner's recommended report and order (R. 1) was served upon the parties. After the filing of exceptions and replies thereto oral argument was had before the Commission on March 8, 1954. By its report and order of November 22, 1954, in *The Rock Island Motor Transit Company Common Carrier Application,* (R. 93) 63 M. C. C. 91, complained of herein, the Commission granted Motor Transit's Section 207 application, finding that the present and future public convenience and necessity required Motor Transit's operations between Silvis and Omaha free of any auxiliary and supplemental restrictions. While Silvis and Omaha are the extremeties of the operations that would be authorized by the report and order herein, it is clear that by "tacking" these rights to rights it has acquired previously Motor Transit would be able to perform all-out trucking in an area ranging from Minneapolis-St. Paul on the north, Kansas City on the south, Chicago on the east and Omaha on the west. The appellants herein, protestants and interveners in the Commission proceeding, on February 16, 1955, petitioned the Commission for reconsideration of its report, and Motor Transit and interveners in its behalf resisted. The petition for reconsideration was denied by order (R. 122, 137) of the Commission dated July 6, 1955, served July 14, 1955, corrected copy served July 27, 1955.

The District Court Upheld the Commission's Grant.

Appellants, plaintiffs below, filed their complaint (R. 85) in the District Court on July 20, 1955. The case was heard by the District Court on December 15, 1955. The opinion (R. 192) was rendered January 11, 1956, and the

judgment (R. 195), January 27, 1956. The notice of appeal (R. 197) was filed March 23, 1956. Probable jurisdiction was noted by this Court on October 8, 1956 (R. 204), 352 U. S. 816, 77 S. Ct. 36.

SUMMARY OF ARGUMENT

The Commission's report and order complained of herein would confer upon Motor Transit a broad grant of authority to conduct motor-carrier operations not auxiliary to or supplemental of the train service of its parent railroad. In the area directly involved comprising a total of approximately 500 miles of routes, serving such important points as Chicago, Des Moines, Cedar Rapids and Omaha, the proposed operations would constitute a complete departure from the type of service contemplated by the statute and heretofore authorized by the Commission.

Further, the record before the Commission makes it clear that the railroad subsidiary, by "tacking" the authority granted by the Commission to authority already held, would be able to perform completely unrestricted motor-carrier service over a much broader area than that directly involved in the proceeding before the Commission, including, for example, service between such important points as Chicago and Kansas City. This without a scintilla of evidence in the record before the Commission of any need for such additional motor-carrier service and in the teeth of the Commission's holding, at an earlier stage of this same proceeding, that a railroad applicant for motor-carrier operating authority "has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad."[3]

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[3] *Rock Island Mtr. Transit Co.—Purchase—White Line M. Frt., supra*, at 40 M. C. C. 474. Report of the entire Commission on reconsideration.

Whether it be viewed as the lifting of auxiliary and supplemental restrictions imposed on motor carrier operating authority previously acquired by purchase or as a grant of new authority not subject to auxiliary and supplemental restrictions, the Commission's report and order complained of herein violates the letter and the spirit of the law, to wit, the National Transportation Policy and Sections 5(2)(b) and 207 of the Interstate Commerce Act, and is contrary to the decisions of the Commission and this Court. The report and order ignores completely the first prerequisite to Commission approval that the service by motor vehicle be for use by the parent railroad *in its operations*. It pays lip service only to the further prerequisite, which it could not validly reach, that the proposed operation is in furtherance of the public interest and will not unduly restrain competition. However, even assuming the Commission had been able to make the necessary findings, the only operations that could be approved nevertheless would be auxiliary and supplemental operations, and the Commission would be required, as it is in the case of every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise, to condition the authority so as definitely to limit future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

The import of the Commission's grant of unrestricted motor-carrier authority to Motor Transit far transcends consideration of the immediate needs of the shippers and receivers of freight in the affected area, the willingness and ability of the existing motor carriers to satisfy that need, or the impact of the added competition of a railroad-sustained, State-protected subsidiary motor car-

rier.[4] Being the first case involving an attempt to award unrestricted motor rights of such magnitude to a railroad or its subsidiary, this proceeding presents the basic question of the proper relationship between the railroads and the motor carriers. Is the latter mode of transportation to continue the measure of independence of the control of the former that has existed in the past? Is an independent motor carrier industry, contemplated by the National Transportation Policy and the Interstate Commerce Act to be supplanted, through Commission fiat, by fully integrated transportation rendered by the railroads and their wholly-owned subsidiaries?

The Interstate Commerce Commission from the time of the *Barker* decision, *infra*, until its report and order complained of herein has recognized its duty of confining motor-carrier operations of railroads or their subsidiaries to service auxiliary to, and supplemental of, their rail service. In accordance with the Congressional mandate it has sought to maintain the integrity of the independent

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[4] Motor Transit is the only motor carrier with intrastate authority to operate over U. S. Highway 6 between the Iowa points involved herein. This intrastate monopoly (R. 98), conferred by the Iowa State Commerce Commission, enables Motor Transit to transport in the same vehicle combined loads of interstate and intrastate traffic to and from the small Iowa points, much more economically than can the independent motor carriers which are denied the right to transport intrastate freight. The Commission, clearly aware of this, nevertheless subordinated its duty, set forth in the *Parker* case, *infra*, to guard against a transportation monopoly, in favor of Iowa's policy directly to the contrary, by authorizing Motor Transit to handle interstate traffic to and from the same small Iowa points with no restrictions imposed. If the Commission's decision is allowed to stand, the Iowa intrastate monopoly granted Motor Transit will inevitably ripen into a complete monopoly, both of inter- and intrastate freight. This is bad enough in itself, but the Commission grossly compounds its error by allowing Motor Transit to conduct unrestricted operations between major cities throughout the parent railroad's system, in Iowa and elsewhere, despite the absence of a shred of record evidence to support a need for such service.

motor-carrier industry. To be sure, appellants believe the Commission has been altogether too generous in authorizing the railroads to engage in over-the-road trucking operations in the performance of so-called auxiliary and supplemental service. It has glossed over the statutory requirements that the railroads establish that their acquisition of existing motor-carrier operating authority is in the public interest (Section 5(2)(b)) or that their inauguration of a new motor-vehicular operation is required by the public convenience and necessity (Section 207). It has permitted railroads to operate inter-city trucks in feeder service and service in substitution for way freight trains upon a mere showing that the railroads thereby could achieve certain economies; the Commission's decisions "construe the statute as if 'railroad convenience and necessity' rather than 'public convenience and necessity' were the standard." Mr. Justice Douglas, dissenting in the *Parker* case, *infra*, at 326 U.S. 74, 65 S. Ct. 1497. But even though its standard of public need in the case of rail applications to perform truck service has been different (and much easier to satisfy) than has been the case in connection with applications by independent motor carriers, nevertheless the Commission has never heretofore authorized a railroad to conduct unrestricted trucking operations of the magnitude of those involved herein.

By the departure from its policy that the decision herein represents the Interstate Commerce Commission would permit the complete integration of truck and rail transportation. Not confined to operations auxiliary to, and supplemental of, the train service of the parent railroad company, the grant of unrestricted motor-carrier operating authority would enable the railroad subsidiary to compete all-out with independent motor carriers and indeed with the railroad itself. The subsidiary, relying on the financial and soliciting resources of the parent

railroad, would be such a potent competitor that it soon would be able to dominate the field and eventually drive the independent motor carriers from the roads. A motor industry owned or controlled by the railroads certainly was not what Congress had in mind. The appellants here are not objecting to the use of trucks by the railroads in pick-up and delivery services, feeder service or service in substitution for way freight trains. Stated differently, they are not objecting to a railroad's use of trucks in service auxiliary to, or supplemental of, the railroad's train service. They are, however, objecting to the entry of the railroads into the trucking business through subsidized motor affiliates rendering an unrestricted trucking operation such as would otherwise be rendered by the independent motor carriers. In short, our objection goes to the fundamental departure from policy which is inherent in the Commission's decision—the complete abandonment of the rule, consistently applied since motor carriers came under federal regulation, that railroad use of motor vehicles must be so tied in with their train operations as to enable the Commission to hold that the motor service authorized is for the purpose of improving the railroad's train service, as distinguished from the performance of a completely independent motor service. Appellants believe that Congress by the enactment of the National Transportation Policy and the provisions of Sections 5(2)(b) and 207 of the Interstate Commerce Act made it abundantly clear that the Commission was not empowered to authorize railroads to perform motor-carrier service completely divorced from their train operations. Indeed, both the Commission and the Government, in their joint brief filed in this Court in 1951 in the *Texas and Pacific* case, subscribed to this view. See discussion, *infra*, pp. 25 and 26.

The Interstate Commerce Commission by promulgating the order complained of went counter to the Congressional direction and exceeded its lawful authority.

ARGUMENT

The Proviso of Section 5(2)(b)—Formerly Section 213

Congressional Policy Against Integration of Competing Modes of Carriage Long Antedated the Motor Carrier Act.

The principle that competing media of transportation should not be commonly owned or controlled was well established by the time interstate motor carriers came under federal regulation. The Panama Canal Act of 1912, 37 Stat. 566, 49 U.S.C. §5 (14), (15) and (16), and the legislative debates thereon announced in unequivocal terms the desire of Congress to keep each form of transportation independent of ownership or control by carriers with which it was in actual or potential competition. "The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition." H. R. Rep. No. 423, 62nd Cong., 2nd Sess. (1912), p. 12.

Two years after the passage of the Panama Canal Act Congress enacted the Clayton Act, 38 Stat. 731, 15 U.S.C. §18, applicable to railroads as well as other corporate enterprises, which prohibited the acquisition by one corporation engaged in interstate commerce of stock in another such corporation if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Later Section 500 of the Transportation Act of 1920, 44 Stat. 499, 49 U.S.C. §142, declared it "to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation". In the same vein Congress, in establishing the Inland Waterways Corporation, speci-

fied that "no member of the board shall be an officer, director, or employee of or substantially interested in, any railroad corporation." 43 Stat. 361, 49 U.S.C. §154. Congress further directed "that the facilities of the corporation shall not be sold or leased (1) to any carrier by rail or to any person or company directly or indirectly connected with any carrier by rail." 45 Stat. 978, 49 U.S.C. §153.

It was to be expected, therefore, that, when the motor carrier industry had grown to such importance that it become desirable to bring it under Federal regulation, the Congress, notwithstanding the recommendation of the Interstate Commerce Commission that the railroads should be permitted to engage in the transportation of freight by motor truck on an equal basis with independent operators, *Coordination of Motor Transportation*, 182 I.C.C. 263, 377, would safeguard the motor carrier industry, as it had the water carrier industry, from domination and control by the railroads or other competitive transportation media.[5] Indeed, **"there was strong opposition to permitting the railroads to acquire motor carriers at all. . . . the proviso [of Section 213] was intended to do no more than to authorize that the railroads be permitted to acquire motor carriers for use of the motor service in their own operations, principally way-train and terminal operations. Indeed, all the legislative history, including the historical background thereto, confirms this view, as do the early Commission motor carrier reports, since consistently followed."** Brief for U.S. and I.C.C. before Supreme Court in *U. S. v. T. & P. Motor Transp. Co.*, p. 35.

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[5] Comparable limitations upon ownership or control by competing transportation agencies subsequently were included in the legislation bringing air carriers under Federal regulation. Section 408 of the Civil Aeronautics Act of 1938, 49 U.S.C. §488.

Congress Forbade Railroad Control of the Motor Carrier Industry.

By Section 213 of the Motor Carrier Act of 1935 (now included in Section 5 of the Interstate Commerce Act) the Interstate Commerce Commission, which had been charged with the Act's enforcement, was authorized to approve the acquisition of control of a motor carrier by another such carrier upon a finding, after hearing, that "the transaction proposed will be consistent with the public interest". However, should the applicant for Commission approval be "a carrier other than a motor carrier"—that is, a carrier by railroad, express or water—the Commission was precluded from acting favorably thereon unless the proposed transaction met the following three requirements:

1) It would "promote the public interest":

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[6] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the proceeding of the time and place for a public hearing. If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

2) It would enable the acquiring carrier "to use service by motor vehicle to public advantage in its operations"; and
3) It would "not unduly restrain competition."

In speaking of this limitation on the right of the railroads to acquire motor carriers Chairman Sadowski of the Subcommittee of the House Committee on Interstate and Foreign Commerce said:

> Section 213 provides that the Commission shall control the consolidation, merger, and acquisition of control of motor carriers. I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor-carrier industry, that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation. 79 Cong. Rec. 12206, July 31, 1935.[7]

To the same effect, Senator Burton K. Wheeler, then Chairman of the Senate Committee on Interstate Commerce, said of the proviso in Section 213 of the Bill:

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[7] Commissioner Joseph B. Eastman of the Interstate Commerce Commission, the most distinguished transportation authority of his time, testifying in 1938 before a subcommittee of the Senate Committee on Interstate Commerce, said of the proviso:

> The reason for that proviso was that at the time when this act was under consideration by your committee, there was a feeling on the part of many that railroads, for example, ought not be permitted to acquire motor carriers at all. It was pointed out, in opposition to that view, that there were many cases where railroads could use motor vehicles to great advantage in their operations, in substitution for rail service, as many of them are now doing. Many railroad men, for example, feel that the operation of way trains has become obsolete; that the motor vehicle can handle such traffic between small stations much more economically and conveniently than can be done by a way train; and the motor vehicles are being used in that way by many railroads. The same is true of many terminal operations. The motor vehicle is a much more

With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests. 79 Cong. Rec. 5655, April 15, 1935.

In the* Barker *Case the Commission Properly Viewed its Duties Pursuant to the Proviso.

The leading early Commission motor carrier report dealing with the problem of rail utilization of trucking facilities was *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101, decided October 8, 1936. Therein a motor-carrier subsidiary of the Pennsylvania Railroad Company applied for Commission aproval for the purchase of the operating rights of an independent motor carrier for the purpose of offering motor-vehicle service, on the one hand fully coordinated with, and on the other hand completely disassociated from, the rail operations of the railroad. The Commission, Division 5, after re-

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flexible unit than a locomotive switching cars, and it can be used to great advantage and with great economy in many railroad operations.

For that reason, something of a compromise was reached between those two opposing views, and it was provided that a railroad could acquire a motor carrier if it could make special proof that the transaction was not only consistent with the public interest but would promote the public interest in a special way, namely by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations. And a further finding was required, that the acquisition will not unduly restrain competition.

Now, in drafting that, while it was aimed particularly at railroad acquisitions, the general expression "carrier other than a motor carrier" was used, it being felt that the same thing might apply to water carriers possibly or possibly to express companies or possibly to electric railways in certain situations. Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 3606, 75th Cong., 3rd Sess., p. 23.

viewing the provisions of Section 213, observed, "It is the obvious intent of the act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in other forms of transportation, and no doubt railroads were particularly in mind." 1 M.C.C. 109. The Commission, at 1 M.C.C. 111, declined to give its approval to the purchase, setting forth its reasons in what since has become the classic statement of the rationale underlying the separation of rail and truck ownership or control:

> While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

Thus, at the very inception of its regulation of the motor-carrier industry, the Commission construed the governing statute as requiring it to restrict rail use of motor vehicles in such a manner as to insure against rail control and consequent retardation of the future

development of independent truck service. Until this proceeding it has insisted that the motor-carrier service furnished by a railroad or an affiliated company "be confined to service auxiliary and supplementary to that performed by the . . . [railroad] in its rail operations. . . ." 1 M.C.C. 113. Spelling out exactly what it meant by such limitation the Commission, Division 5, said in a supplemental report in the *Barker* case, at 5 M.C.C. 9, 11:

> Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself; those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.

The principle of the *Barker* case, that a railroad should be authorized to engage in motor-carrier operations only to the extent that it employs such service in operations auxiliary and supplementary to its train service, was approved by the full Commission in *Northland—Greyhound Lines, Inc.—Purchase—Liederbach*, 5 M.C.C. 215, and was followed by Division 5 in at least ten other acquisition proceedings under Section 213 of the Act during the following two years.[8]

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[8] *Norfolk S. Bus Corp.—Purchase—Etheridge and Lennon*, 5 M.C.C. 707; *Texas & P. Motor Transport Co.—Purcha[illegible]—Southern Transp.*, 5 M.C.C. 653; *Motor Transport Co.—Purchase—Jansen*, 5 M.C.C. 570; *Rock Island M. Transit Co.—Purchase—White Line M. Frt., supra; Burlington Transp. Co.—Purchase—Bell Transfer, Inc.*, 5 M.C.C. 291; *Santa Fe Trail Transp. Co.—Purchase—Schaeffer*, 5 M.C.C. 115; *Texas & P. Motor Transport Co.—Purchase—Johnson*, 5 M.C.C. 89; *Santa Fe Trail Transp. Co.—Control—Western Transit Co.*, 5 M.C.C. 81; *Pennsylvania Truck Lines, Inc.—Control—Alko Exp. Lines*, 5 M.C.C. 77; and *Pennsylvania Truck Lines, Inc.—Purchase—Cain*, 5 M.C.C. 73.

The Proviso Applied to Section 207

The Declaration of Policy Called for the Preservation of the Inherent Advantages of Truck Transportation.

While the express limitations upon railroad participation in truck transportation, contained in Section 213, were not repeated in Section 207 of the Act, 49 U.S.C. §307, governing the issuance of motor-carrier certificates of public convenience and necessity, that section, as any other, was required to be read in connection with the rest of the Act and interpreted with due regard to its manifest purpose. This Court has applied this principle to the Interstate Commerce Act. *Nashville, C. & L. Ry. v. State of Tennessee*, 262 U.S. 318, 43 S.Ct. 583.

Section 202 of the Motor Carrier Act, now expanded into the National Transportation Policy, 49 U.S.C. preceding §1, required the Commission "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers." It declared further that motor carrier service should be rendered without "unfair or destructive competitive practices" and that the Commission should "improve the relations between and coordinate transportation by and regulation of, motor carriers and other carriers."

In speaking of this provision in the debate preceding enactment of the bill that became the Motor Carrier Act, Senator Wheeler said:

> Subsection (a) [of Section 202] contains a comprehensive declaration of policy. As amended, it makes clear that the policy of Congress is to deal fairly and impartially with transportation by motor carriers and to preserve the natural advantages of such transportation.
>
> . . . we specifically wrote into the bill, in the declaration of policy provision, and at other places throughout the bill, that the peculiar features of

transportation by truck and by bus should be taken into consideration at all times by the Interstate Commerce Commission, and we put such a provision in the declaration of policy. 79 Cong. Rec. 5650, April 15, 1935.

We tried to modify it [the bill] as much as possible to take away any fear that might exist in the minds of some that the motor buses and trucks were going to be regulated in the interest of the railroads. 79 Cong. Rec. 5657, April 15, 1935.

The Statement of Commissioner Eastman Revealed the Commission Would Give Effect to the Proviso in Reading the Act as a Whole.

As early as 1938 it was firmly settled that the Commission was bound as strongly under Section 207 as under Section 213 to limit a railroad's motor-carrier operations to those which are auxiliary to, and supplemental of, its rail service. It was in March of that year that Commissioner Eastman, speaking for the Commission, testified on S. 3606, a bill to amend certain sections of the Motor Carrier Act, before a subcommittee of the Senate Committee on Interstate Commerce, 75th Congress, 3rd Session. Senator Shipstead, a member of the Committee, had offered an amendment to the bill which would have added an express proviso to Section 207, as was contained in Section 213, requiring the Commission to deny the application filed by a carrier other than a motor carrier unless it found "that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Hearings on S. 3606, Senate Committee on Interstate Commerce, 75th Cong., 3rd Sess., p. 23.

The purpose of the amendment was explained in an exchange between Senator Shipstead and Commissioner Eastman, as follows:

Senator Shipstead. Well, there has been an apprehension that the things prohibited in the Act, so far as purchasing and acquiring are concerned, and the denial to purchase and acquire, can be secured in this way: That they can acquire indirectly, by a certificate, what they cannot otherwise acquire.

Commissioner Eastman. I think you mean that they could acquire a motor carrier and make the requisite proof under Section 213, and then could extend the operations of that motor carrier without making any such proof. And your proposed amendment, here, is intended to correct that situation.

Senator Shipstead. Yes; it is intended to clarify what seems to be a misunderstanding as to the act. I think the intention of Congress was perfectly plain. But the question has arisen, and in order to avoid any further controversy, this amendment is introduced. It would change the whole policy of the act, if they could proceed to acquire by certificate what they are not directly permitted to do. The question is whether that should be allowed to continue. (Hearings, pp. 28 and 29)

Commissioner Eastman stated that the Commission did not oppose the amendment, but he expressed some doubt that it actually was necessary in view of the Commission's probable construction of the pertinent provisions of the Act.

Commissioner Eastman . . . We have indicated that it seems to us consistent with the policy now reflected in section 213(a), paragraph 1; that his amendment should be added to section 207(a).

In other words, if a railroad must submit special proof that the public interest will be promoted in certain respects, before it can acquire a motor carrier, it seems entirely consistent that it shall make such special proof when it seeks to extend the operations of a motor carrier which is already under its control. So we have no objection to offer to the amendment.

As a matter of fact, I think it could be argued with a great deal of force that in interpreting and

applying the provisions of section 207(a) as it now stands, the Commission should read the act as a whole and take cognizance of this policy which is now reflected in section 213(a)(1).

* * * *

. . . If I had to pass on the issue now, I should say that in administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of section 213.

Senator Johnson of Colorado: Under the present law?

Commissioner Eastman: Under the present law. (Hearings, pp. 27-30)

The following day, relying on Commissioner Eastman's representation that his amendment was unnecessary, Senator Shipstead withdrew the amendment.

Senator Shipstead: . . . In view of the statement made by Commissioner Eastman for the Commission as to their view of this matter, and also his personal view, that he thinks the provision of this amendment is already in the law, and that . . .

Senator Johnson of Colorado (interposing) . . . that is, you mean the Shipstead amendment?

Senator Shipstead: Yes; that it is already in the law, and evidently he considers it unnecessary at the present time. So, in order to save the time of the subcommittee, and in order to facilitate advancing the Commission's recommendations for amendments to the Motor Carrier Act, I withdraw, for the present at least, the amendment I offered. I think we will stand on the Commission's point of view, and the personal view of Commissioner Eastman. (Hearings p. 141.)

Commissioner Eastman's testimony clearly indictated that a proper interpretation of the statute required the

Commission to read the proviso of Section 213 into Section 207 whenever a railroad or rail-controlled motor carrier sought to extend its operations under the latter section. The legislative history of the 1938 amendments to the Motor Carrier Act, demonstrates that Congress was satisfied that the Interstate Commerce Commission would apply the restrictive proviso of Section 213 to proceedings under Section 207 as well.

The testimony of Commissioner Eastman was quoted in part and with approval by the Commission and the Government at pages 31 and 32 of their joint brief in the *Texas and Pacific* case, and later in the brief, at pages 53-55, they said:

> **To be sure, section 207 does not contain a provision like that in section 213 (now sec. 5), imposing restrictions and requiring special findings in instances where the applicants are railroad subsidiaries. But that section does preclude the Commission from granting a certificate of operating authority unless it is able to find that the proposed operations are required by public convenience and necessity; and, in instances of applications by railroad subsidiaries, the Commission, in the practical administration of section 207, is confronted with substantially identical obstacles and problems as in cases of applications by railroad subsidiaries under section 213. Like section 1 (18), which forbids the railroads from extending their lines unless authorized by the Commission based on findings that the extension is required by public convenience and necessity, section 207 was enacted by Congress to enable the Commission to control and prevent wasteful competition and destructive competitive practices. Although section 213 (now sec. 5) deals with the acquisition of existing motor carrier operations, which, as acquired by railroad subsidiaries, would presumably be taken out of the field of independent existing competition, nevertheless, the purposes of Congress' transportation policy, declared when enacting the Motor Carrier Act, refute any inference that Congress, while closing the door to railroad suppression of motor carrier com-**

> **petition by means of acquiring through a subsidiary existing motor carrier operations, at the same time left open the unfettered opportunity to do the same thing by means of obtaining through a subsidiary authority to institute new motor carrier operations. So far as opportunity for suppression of competition is concerned, there is little difference, particularly in the motor carrier field, between the opportunity afforded through the control by a railroad of an already existing motor carrier and that afforded by control of one newly created. . .**

Reversing completely its 1951 argument, the Commission now lays great stress upon the absence from Section 207 of the specific language of the proviso of Section 5(2)(b). The failure to include such language in the section of the statute dealing with extension applications such as that involved here, says the Commission, allows it to ignore the Congressional mandate whenever it decides that restricting railroad operation of motor vehicles "is clearly not in the public interest." (R. 115), 63 M.C.C. 107-108. This effort of the Commission to arrogate to itself the prerogative which Congress has already exercised evokes the recent pronouncement of this Court in *N.L.R.B* v. *Lion Oil Co.*, 352 U.S. 282, 288, 77 S. Ct. 330, 334:

> In Mastro Plastics Corp. v. National Labor Relations Board, supra, we had before us another provision of §8(d). What we said there in ruling out a narrowly literal construction of the words of the statute is equally apropos here. "If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' United States v. Boisdoré's Heirs, 8 How. 113, 122, 12 L.Ed. 1009." 350 U.S. at page 285, 76 S. Ct. at page 359. Moreover, in Mastro Plastics we cautioned against accepting a construction that "would produce incongruous results." Id., 350 U.S. at page 286, 76 S. Ct. at page 360.

In the Kansas City Southern *Case the Commission Properly Applied the Terms of the Proviso in a Section 207 Proceeding.*

Later in the year 1938 in the leading case of *Kansas City S. Transport Co., Inc., Com. Car. Application,* 10 M.C.C. 221, the Commission, Division 5, found that the principles and criteria laid down in the *Barker* case, *supra,* as applicable to acquisition proceedings under Section 213 were equally applicable to proceedings under Section 207. One observer, analyzing the developments, noted that it seemed unlikely that Congress intended, after creating a narrow doorway through which railroads must squeeze into the trucking field with difficulty, in the next breath to create a larger doorway through which the railroads could walk with more ease. J.E.E., "Interstate Commerce Act—Certificates of Public Convenience and Necessity—Railroad Application for Truck Lines to Haul Less-than-Carload Freight Between Railroad Way-Stations," Geo. Wash. L. Rev., 14: 838, Feb. '46.

In the *Kansas City Southern* case the railroad affiliate sought, under Section 207, motor common carrier rights to operate partly in auxiliary and supplemental service and partly in independent service. The Commission, Division 5, denied the application for independent service and granted, in part, that for auxiliary and supplemental service. After discussing the *Barker* decision, it made the limited grant, subject, however, to five conditions intended to insure that service would remain auxiliary and supplemental to the train service of the railroad.[9] The

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[9] 1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Kansas City Southern Railway Company or the Arkansas Western Railway, hereinafter called the railways.

2. Applicant shall not serve, or interchange traffic at, any point not a station on a rail line of the railways.

3. Shipments transported by applicant shall be limited to those which it receives from or delivers to either one of the railways under a through bill of lading covering, in addition to movement

decision in the *Kansas City Southern* case thereafter was followed consistently, and by 1940 substantially identical restrictions had been imposed in disposing of numerous railroad applications for motor carrier operating authorities.[10]

The consistent imposition of restrictions intended to limit railroad motor-carrier operations to service auxiliary and supplemental of the train service of the railroad—in application proceedings under Section 207 as well as acquisition proceedings under Section 213—left no doubt as to how the Commission construed the requirements of the law. Section 213, prescribing that the motor service

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by applicant, a prior or subsequent movement by rail.

4. All contractual arrangements between applicant and the railways shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service. [10 M.C.C. 240.]

[10] *Pennsylvania Truck Lines, Inc., Com. Car. Application*, 24 M.C.C. 261; *Missouri Pac. R. Co. Com. Car. Application*, 22 M.C.C. 321; *Louisiana, A. & T. Ry. Co. Common Carrier Application*, 22 M.C.C. 213; *Barcus Extension of Operations—Household Goods*, 22 M.C.C. 147; *Seaboard Air Line Ry. Co. Extension—Tampa, Fla.*, 21 M.C.C. 773; *Pacific Motor Trucking Co. Common Carrier Application*, 21 M.C.C. 761; *Rock Island Motor Transit Co. Com. Car. Application*, 21 M.C.C. 513; *Texas & P. Motor Transport Co. Ext.—Marshall, Tex.*, 20 M.C.C. 593; *Missouri Pac. R. Co. Extension—Arkansas—Louisiana*, 20 M.C.C. 563; *Great Northern Ry. Co. Extension—Hobson—Lewistown*, 19 M.C.C. 745; *Chicago R.I. & P. Ry. Co. Ext.—Iowa, Mo., Kans., and Nebr.*, 19 M.C.C. 702; *Missouri Pac. R. Co. Extensions of Operations—Illinois*, 19 M.C.C. 605; *Gulf, M. & N.R. Co. Common Carrier Application*, 18 M.C.C. 721; *Seaboard A.L. Ry. Co. M. Operation—Gaston-Garnett, S.C.*, 17 M.C.C. 413; *Texas & P. Motor Transport Co. Ext.—Big Spring—Pecos, Tex.*, 14 M.C.C. 649; *Texas & P. Motor Transport Co. Ext.—Wills Point, Tex.*, 14 M.C.C. 645; *Illinois Central R. Co. Common Carrier Application*, 12 M.C.C. 485; *Santa Fe Trail Transp. Co.—Ext. Moline—Chautauqua*, 11 M.C.C. 613; *Texas & P. Motor Transport Co. Com. Car. Applic.—Louisiana*, 10 M.C.C. 525.

be of public benefit in its, the railroad's operations, and Section 202, directing that the inherent advantages of motor carriers be preserved, imposed a duty upon the Commission to allow railroads to engage in motor-carrier operations only as such operations were coordinated with their rail operations.

Congress Approved the Commission's Application of the Proviso to Section 207 Proceedings.

Such was the construction of the Commission at the time that the Congress considered the legislation that became the Transportation Act of 1940, 54 Stat. 899 *et seq.* A number of cases which reflected the practice of the Commission of restricting railroad-affiliated motor carriers to the rendition of auxiliary and supplemental service had been specifically called to Congress' attention prior to the enactment of the 1940 Act. *United States v. Rock Island Motor Transit Co., supra*, at 340 U.S. 432. For example, the decision in the *Kansas City Southern* case was discussed at page 107 of the 53rd Annual Report of the Interstate Commerce Commission to Congress, and that in *Pennsylvania Truck Lines, Inc. Control—Barker, supra*, was discussed at pages 68 and 69 of the 51st Annual Report.

By the Transportation Act of 1940 the provisions of former Section 202 were broadened to embrace the other forms of transportation and became the National Transportation Policy. The provisions with respect to consolidations and mergers formerly in Section 213 were moved forward and incorporated into Section 5(2)(b) of the Act. While the phraseology was changed somewhat, the Congressional conferees made it plain "that it is not their intention, by changing the language of section 213 . . . to change the legislative intent of the Congress one iota with respect to the acquisition of a carrier by motor vehicle by a carrier by railroad, and that it is the intention of the conferees that section 5(2)(b), as

amended by section 7 of the conference report, shall have the same practical application and legal effect as section 213(a)(1) as it is now shown in Part II of the Interstate Commerce Act". 86 Cong. Rec. 10188, August 12, 1940. It is well established that such Congressional reenactment serves as an implied legislative approval of prior construction. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 499, 500, 53 S.Ct. 721, 729; *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U.S. 552, 557, 52 S. Ct. 211, 212; *Brewster* v. *Gage*, 280 U.S. 327, 337, 50 S. Ct. 115, 117. As this Court said in *N. Y., N. H. & H. R. Co.* v. *I.C.C.*, 200 U.S. 361, 26 S.Ct. 272, 281:

> . . ..a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute.

Accordingly, if there had been any doubt that former Section 202 of the Motor Carrier Act required the Commission to read the provisions of Section 213, pertaining to purchase applications, into Section 207, dealing with extension applications, such doubt was removed finally by the enactment of the National Transportation Policy. The Commission and this Court in the *Rock Island* and *Texas & Pacific* cases, *infra*, in fact have recognized that this policy requires such construction.

Auxiliary and supplemental restrictions consistently applied to effectuate proviso

The Commission Consistently Restricted Grants of Motor Carrier Authority to Railroads to The Rendition of Auxiliary and Supplemental Service.

Since the original decision in the *Barker* case, the Commission has steadfastly held that railroads should

not be permitted to invade the field of motor service except for the purpose of conducting such motor carrier services as are auxiliary to and supplemental of rail service. Interstate Commerce Commission, Bureau of Transport Economics and Statistics, *Historical Development of Transport Coordination & Integration in the United States*, 1950, p. 108.

Where rail carriers have been granted motor-carrier operating authority, appropriate conditions similar to those set out in the *Kansas City Southern* case have been imposed. The imposition of these restrictions, as modified, was approved by the entire Commission in the *Kansas City Southern* case at 28 M.C.C. 5 and in *Chicago, M., St. P. & P.R. Co. Extension—Milwaukee Division*, 53 M.C.C. 341; *Kansas City S. Ry. Co. Extension of Operations*, 42 M.C.C. 74; *Rock Island M. Transit Co. Extension—Chicago—Joliet, Ill.*, 33 M.C.C. 459; and *Chicago, R. I. & P. Ry. Co. Ext.—Iowa, Mo., Kans., and Nebr.*, 30 M.C.C. 621. In these Section 207 application cases, in addition to the general requirement that the service be limited to that auxiliary to, or supplemental of, rail service, including particular restrictions against service at points not stations on the rail lines and so-called key-point restrictions, the Commission has reserved the right to impose in the future such further restrictions as may be found necessary to keep authorized services auxiliary to and supplemental of rail service.[11]

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[11] *Frisco Transp. Co. Extension—Joplin—Miami*, 53 M.C.C. 415; *George Ernst, Jr., Inc. Extension—Nyack, N. Y.*, 52 M.C.C. 157; *Southern Pac. Transport Co. Common Carrier Application*, 51 M.C.C. 695; *Texas & Pacific Motor Transport Co. Com. Car. Application*, 47 M.C.C. 753; *Seaboard Air Line R. Co. Extension—Gaston—Garnett, S. C.*, 47 M.C.C. 433; *Columbia Motor Transport Co. Com. Car. Application*, 46 M.C.C. 69; *Willet Co., Extension—Gary, Ind.—Chicago, Ill.*, 46 M.C.C. 35; *Rock Island Motor Transit Co. Ext.—Omaha and Belleville*, 44 M.C.C. 430; *Green Bay & W.R. Co. Common Carrier Application*, 44 M.C.C. 401; *Illinois Central R. Co. Extension—Iowa, Minn., and S. Dak.*, 43 M.C.C. 767; *Burlington Transp. Co. Ext.—Illinois, Iowa and Missouri*,

The Commission's imposition of auxiliary and supplemental restrictions upon a grant of motor-carrier author-

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43 M.C.C. 729; *Rock Island Motor Transit Co., Extension—Trenton, Mo.*, 43 M.C.C. 470; *Pennsylvania Truck Lines, Inc., Ext.—Ind., Ohio and Pa.*, 42 M.C.C. 759; *Pennsylvania Truck Lines, Inc., Ext.—Pennsylvania Points*, 42 M.C.C. 733; *Willet Co. of Ind., Inc., Ext.—Fort Wayne—Mackinaw City*, 42 M.C.C. 721; *Frisco Transp. Co. Extension—Missouri—Arkansas*, 42 M.C.C. 219; *Santa Fe Trail Transp. Co. Ext.—Joplin*, 41 M.C.C. 713; *Pennsylvania Truck Lines, Inc. Com. Car. Application*, 41 M.C.C. 607; *Pacific Motor Trucking Co. Extension—Reedsport, Oreg.*, 41 M.C.C. 469; *Seaboard Air Line Ry. Co. Extension—Hamlet—Monroe, N.C.*, 34 M.C.C. 511; *Seaboard Air Line Ry. Co. Extension—Waldo—Morriston, Fla.*, 34 M.C.C. 725; *Chicago, M., St. P. & P. R. Co. Ext.—Wisconsin and Michigan*, 34 M.C.C. 475; *Rock Island Motor Transit Co. Extension—Trenton, Mo.*, 33 M.C.C. 506; *Rock Island Motor Transit Co. Extension—Eldon, Iowa*, 33 M.C.C. 349; *Santa Fe Transp. Co., Common Carrier Application*, 33 M.C.C. 333; *Texas & Pacific M. Transport Co. Ext.—Pecos—El Paso, Tex.*, 33 M.C.C. 38; *Gulf Transport Co. Extension—West Point, Miss.*, 32 M.C.C. 762; *Frisco Transp. Co. Extension—Lake City, Ark.*, 32 M.C.C. 141; *Seaboard Air Line Ry. Co. Ext.—Motor Transp., Rhine, Ga.*, 31 M.C.C. 658; *Chicago & N.W. Ry. Co. Extension of Operations—Iowa*, 31 M.C.C. 455; *Chicago & N.W. Ry. Co. Common Carrier Application*, 31 M.C.C. 299; *Illinois Central R.Co. Extension—Kentucky—Tennessee*, 30 M.C.C. 477; *Chicago & N.W. Ry. Co. Extension—South Dakota*, 30 M.C.C. 379; *Rock Island M. Transit Co. Extension—Chicago—Joliet*, 30 M.C.C. 243; *Northern Pac. Transport Co. Extension—Yakima—Prosser*, 30 M.C.C. 58; *Rock Island Motor Transit Co. Extension—Wellman, Iowa*, 29 M.C.C. 695; *Pennsylvania Truck Lines, Inc., Com. Car. Appli., supra; Missouri Pac. R. Co. Com. Car. Application, supra; Louisiana, A. & T. Ry. Co. Common Carrier Application, supra; Seaboard Air Line Ry. Co. Extension—Tampa, Fla., supra; Pacific Motor Trucking Co. Common Carrier Appli., supra; Rock Island Motor Transit Co. Com. Car. Application, supra; Texas & P. Motor Transport Co. Ext.—Marshall, Tex., supra; Missouri Pac. R. Co. Extension—Arkansas—Louisiana, supra; Great Northern Ry. Co. Extension—Hobson—Lewistown, supra; Chicago, R. I. & P. Ry. Co. Ext.—Iowa, Mo., Kans. and Nebr., supra; Missouri Pac. R. Co. Extension of Operations—Illinois, supra; Gulf, M. & N.R. Co. Common Carrier Application, supra; Seaboard A.L. Ry. Co. M. Operation—Gaston—Garnett, S.C., supra; Texas & P. Motor Transport Co., Ext.—Big Spring—Pecos, Tex., supra; Texas & P. Motor Transport Co., Ext.—Wills Point, Tex., supra; Illinois Central R. Co. Common Carrier Application, supra; Texas & P. Motor Transport Co. Com. Car. Applic.—Louisiana, supra.*

ity to a railroad subsidiary pursuant to its practice of applying the proviso of Section 5(2)(b) to proceedings under Section 207 first was sustained by this Court in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 S. Ct. 1490. In reversing the lower court's setting aside of the Commission's order in *Willet Co. of Ind., Inc., Ext.—Fort Wayne—Mackinaw City*, 42 M.C.C. 721, this Court revealed its understanding of the Commission's obligation to consider railroad applications under Section 207 in the light of the limitations of Section 5(2)(b). The Court stressed and approved the fact that the Commission had restricted the certificate under consideration to the rendition of truck transportation which was "truly supplementary or auxiliary to the rail traffic", *id.* at 326 U.S. 63; 65 S. Ct. 1492, and that such limitation was consonant with the legislative history of the Motor Carrier Act which clearly was not intended to "bar" railroads from the operation of motor vehicles but which sought to limit such operations to "appropriate places." *Id.* at 326 U.S. 67, 65 S. Ct. 1494. The Court concluded, at 326 U.S. 69, 65 S. Ct. 1495:

> Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M.C.C. 725-726, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue.

The converse is implicit in the Court's statement. In the absence of findings that the proposed motor-carrier service would be of a different nature from that presently being rendered by independent motor carriers, namely in auxiliary and supplemental service, and that it would not unduly restrain competition the Commission is without statutory authority to order the certificate to issue. Since the action of the Commission before the Court was

approval of an application for a certificate under Section 207 and no issue of acquisition was involved, the foregoing observation obviously represents recognition by the Court that the standards of Section 5(2)(b) must be applied by the Commission in a Section 207 proceeding. Such application would appear necessary because, in the words of this Court, "The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly . . . It has the duty to preserve the inherent advantages of each mode of transportation." *Id.*, at 326 U.S. 73, 65 S. Ct. 1497.

In a companion case, *American Trucking Ass'ns* v. *United States*, 326 U.S. 77, 65 S. Ct. 1499, this Court again looked to the requirements of Section 5(2)(b) in determining the validity of the Commission's grant of authority to a railroad in a Section 207 application proceeding. Reversing the decision of the lower court which had sustained the Commission's order in *Seaboard Air Line Ry. Co. Extension—Gaston—Garnett, S. C.*, 34 M.C.C. 441, the Court determined, at 326 U.S. 83, 65 S. Ct. 1502, that the Commission improperly excluded certain evidence offered to show the economic effect on the existing motor carriers of the proposed motor operation by the railroad and hence relevant to a finding that the proposed operation would be in the public interest and not unduly restrain competition. It is not sufficient, said the Court, that the Commission only find, as it did, that the railroad's trucking operations would be of a "specialized type coordinated with rail operations." Said the Court, at 326 U.S. 86, 65 S. Ct. 1503:

> It is not enough that the railroad's motor operations are found by the Commission to be of a different character from over-the-road motor operations because they are integrated with railroad operations. The Commission *must* also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers. Those affected are entitled to fully

develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information. [Emphasis added].

Patently, this evidence would have been irrelevant in a Section 207 proceeding were it not for the considerations required under Section 5(2)(b). Edward J. Hickey, Jr., "Surface Carrier Participation in Air Transportation Under the Civil Aeronautics Act", *Georgetown Law Journal*, Vol. 36, No. 2, January, 1948, pp. 125-153.

In the Rock Island *and* Texas & Pacific *Cases the Supreme Court Sustained the Commission's Imposition of Auxiliary and Supplemental Restrictions.*

Whatever doubt may have survived this Court's decisions in the *Parker* and *American Trucking* cases that the law required the Commission to examine a railroad's Section 207 application compatibly with the limitations of Section 5(2)(b) was dispelled by the Court's decisions in *United States* v. *Rock Island Motor Transit Co., supra*, and *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450, 71 S. Ct. 422, rendered February 26, 1951.

As was discussed previously herein, in the former case this Court reversed the decision of the three-judge district court which had set aside the order of the Interstate Commerce Commission in *Rock Island M. Transit Co.—Purchase—White Line M. Frt., supra*. The Commission had found that the motor-carrier operating rights purchased by the railroad subsidiary from Frederickson and White Lines, pursuant to Commission approval, should be subject in the future to the five conditions intended to limit the trucking operations to service auxiliary to, and supplemental of, the rail operations of the parent railroad. However, the lower court viewed the imposition

of the restrictions subsequent to the Commission's approval of the acquisitions without such express limitations as being a partial revocation of the authority granted and hence void unless in conformity with Section 212(a) prescribing the procedure for revocation.

This Court reversed, discussing at length the whole area of railroad ownership or control of motor-carrier operations. "The issues," said this Court in opening its remarks in the *Rock Island* case, *supra*, at 340 U.S. 422, 71 S. Ct. 385, "involve a basic power of the Commission to regulate the operations of motor carriers affiliated with railroads so as to assure that at all times the motor operations shall be consonant with the National Transportation Policy, 54 Stat. 899, 49 U.S.C.A., preceding section 301. The Commission has decided that that policy *requires* the motor operations of railroads and their affiliates to be auxiliary to and supplemental of train service." [Emphasis added.] In this construction this Court concurred.

Spelling out in greater detail what it understood the Commission's construction to be, the Court, after reciting the history of the proceeding, said, at 340 U.S. 427, 71 S. Ct. 387:

> The Commission understands the Declaration of Policy, §202(a) of the Motor Carrier Act, enacted at the inception of federal regulation of motor carriers in 1935, 49 Stat. 543, 49 U.S.C.A. §302, as directing it to preserve the inherent advantages of such transportation in the public interest. It finds support for this view in the National Transportation Policy set out in the 1940 amendments to the Interstate Commerce Act, 54 Stat. 899, declaring that the Act should be administered so as to recognize and preserve the inherent advantages of rail, motor and water transportation. It treats §213 of the Motor Carrier Act of 1935 and present §5 of the Interstate Commerce Act as authorizing mergers, consolidations and acquisitions between rail and motor car-

riers only within the Transportation Policy. Although §207, providing for the issuance of certificates of convenience and necessity, has no clause requiring special justification for railroads to receive motor-carrier operating rights, such as appears in the proviso in former §213 and present §5, the Commission applies the rules of the National Transportation Policy so as to read the proviso into §207 in order to preserve the inherent advantages of motor-carrier service.

The Court pointed out specifically, "The Commission has power at the time of its approval of an application to limit the authority to be granted by certificates of convenience and necessity for the operation of motor carriers, whether the certificate is issued on an original application under §207 or after acquisition under §213 of the Motor Carrier Act, §5(2), Interstate Commerce Act." 340 U.S. 430, 71 S. Ct. 389. The limitations restricting railroad motor-carrier operations to auxiliary and supplemental service, said the Court, were "in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible." 340 U.S. 432, 71 S. Ct. 390. "The Commission reads into §207 the same requirement" that it does under §5(2)(b), continued the Court, and "thus a consistent attitude toward the use of motors by railroads is maintained." The Court's conclusion of a consistent attitude on the part of the Commission towards the consideration of railroad applications under Section 5(2)(b) and those under Section 207 takes on special meaning in the context of the Commission's precise pronouncement of what were its obligations under the law. In its brief in the *Texas & Pacific case* (relied on for the legal argument in the *Rock Island* case), wherein the restrictions placed upon motor-carrier operating rights attained by application under Section 207 as well as under Section 5(2)(b) were challenged, the Commission in the footnote on page 52 said:

> . . . if the motor operations of the railroad subsidiary were not a part of the railroad's operations at all, it would be a ***non sequitur*** to consider that the Commission should exercise its administrative judgment to determine whether or not the service by motor vehicle in such operations enabled the parent railroad to use motor service to public advantage in its operations or even to determine whether or not such operations unduly restrain competition. In short, as stated, the statute establishes as a first prerequisite to Commission approval, that the service by motor vehicle be for use by the railroad in its operations. It follows that, if the railroad subsidiary were to use the motor vehicle service in other operations, such, for example, as engaged in by independent motor carriers, a statutory presumption exists that such use would unduly restrain competition and is, therefore, forbidden by Congress.

Even assuming that this Court's observations were made gratuitously in the *Rock Island* case insofar as Section 207 proceedings were concerned, the Court relied upon its decision in the *Rock Island* case for rejecting all reasons for affirming the judgment below in the *Texas & Pacific* case, which, as previously stated, involved restrictions imposed upon Section 207 certificates. At 340 U.S. 458, 71 S. Ct. 426, the Court stated:

> So far as the . . . . issues relied upon by the District Court for its injunction are concerned, they seem to have been resolved in favor of the Government by our opinion in the Rock Island case. This proceeding involves certificates for new routes under §207. No such certificates or applications were in that case. The opinion, however, considered the Commission's practice in §207 proceedings and *stated that it was the same as in §§5 and 213 acquisition proceedings. We now hold that the same considerations justify the reservation in issue here.* [Emphasis added.]

It is clear, therefore, that in the *Rock Island* and *Texas & Pacific* cases this Court sustained the Commission's

construction of the National Transportation Policy as requiring the reading of the restrictive proviso of Section 5(2)(b) into Section 207. Under these decisions any grant of motor-carrier authority to a railroad or its subsidiary must be appropriately restricted to insure the rendition of only auxiliary and supplemental service.

The Commission Recognized, as Did the Railroads, That It Was Powerless to Issue Unrestricted Motor-Carrier Authority to Railroads.

The Commission's annual reports to Congress demonstrate its awareness that it is without authority to approve motor carrier operations by railroads or their motor-carrier affiliates beyond the extent that those operations can be coordinated with those of the railroad. In its *65th Annual Report* (1951) the Commission stated, at page 4:

> Some urge that the railroads, in order to improve service and reduce costs, should make greater use of motor transportation in conjunction with their rail operations. Our interpretations of the statute are criticized as placing undue restrictions on such use by not permitting "all motor" operations. This problem has been given thorough consideration. Our interpretations were sustained in *U.S.* v. *Rock Island*, 340 U.S. 419 and *U.S.* v. *T. & P.*, 340 U.S. 450. Legislation is required if there is need in the public interest for more liberal treatment of the railroads in this respect.

Again the following year the Commission observed that the law would have to be changed before it could authorize railroads to engage in all-motor operations, saying at page 3 of its *66th Annual Report* (1952):

> INTERAGENCY COMPETITION.—In our last report we discussed at length the forces which produce continued and great competitive thrusts among transportation agencies and the principles which guide us in passing on the issues which reach us for

decision. We also referred to railroad criticisms of what is looked upon as an unduly restrictive policy in dealing with railroad applications to engage in motor-carrier service. Shippers have expressed an interest in greater use of motor vehicles as a means of improving less-than-carload service.

> During the year there has been continued and apparently more concerted discussion in railroad quarters of the desirability of giving railroads more freedom in dealing with what they designate as managerial questions, particularly in the adjustment of rates and in the use of motor transport facilities. It is obvious that a substantial change in Congressional policy, particularly as it relates to intercarrier competition in its bearing on the public interest, is presented by this type of proposal, and that a more searching analysis of the possible advantages and disadvantages, and of the implications of such a change, must be made than any which thus far have come to our attention. There are a number of aspects of interagency competition which would be embraced in a broad review of the subject. It shows itself in forums concerned with matters with which we do not deal. We necessarily abstain from expressions of views here as to these issues or the broader problems of policy which they involve.

Only a short time ago, in its *68th Annual Report* (1954) the Commission again referred to its inability under the law to grant unrestricted motor-carrier authority to a railroad or its subsidiary. At page 5 the Commission said:

> INTEGRATION. Efforts to obtain a relaxation of our interpretations of what the Act permits in the operation of highway motor vehicles by railroads again were made during the year. We have adhered to our prior interpretations.

Nevertheless, even before the *68th Annual Report* was released to the public the Commission departed from its prior interpretations in issuing the report and order complained of herein, for the latter confers broad grants of

motor-carrier authority to the railroad's subsidiary free of any auxiliary and supplemental restrictions and in disregard of the requirement that the Commission must find that the proposed motor-carrier operations by the railroad will be of public benefit in its operations.

The unrelenting efforts of the railroads to have the Act amended clearly indicate that the Interstate Commerce Act does not permit the Commission to authorize a railroad, directly or through a subsidiary company, to engage in unrestricted motor carrier operations. Having challenged the interpretation heretofore consistently placed upon the Act by the Commission in the *Rock Island* and *Texas & Pacific* cases and having been denied judicial relief, the railroads have sought to attain their ends by legislative change. Over the years they have urged that the Act should be amended so that the Interstate Commerce Commission will have no choice but to treat a railroad seeking to acquire a motor carrier under section 5(2)(b) or to inaugurate a new motor carrier service under section 207 as if it were an ordinary applicant. The railroads have advocated the repeal of the special limitations on railroad acquisition of motor carriers expressly stated in Section 5(2)(b) and read into Section 207 and have asked that they be required simply to establish that the public convenience and necessity requires the proposed motor-carrier operation.

"The law should be so phrased," said Vice President R. V. Fletcher of the Association of American Railroads in a 1944 address, "as to place a carrier seeking permission to operate in another field in the same category as an individual asking for the right to enter the business." *Traffic World*, vol. LXXIII, no. 22, May 27, 1944, p. 1450. To the same effect the statement submitted by the A.A.R. in response to the 1946 inquiry of the House Committee on Interstate and Foreign Commerce said, "We think there should be no more restrictions against such con-

solidations [of carriers of different types] than apply to consolidations between carriers of the same type." P. Harvey Middleton, *Transportation Coordination in the U.S.*, Railway Business Association, Chicago, 1946. The study published in 1947 by the A.A.R. on *Transportation in America* recommended, "Rail carriers should have the right to engage, either directly or through subsidiaries, in motor-vehicle service on the highways on equal terms with all others, and without discrimination in favor of or against other transportation agencies in the same field. This should include the right to purchase, equally with all others, lines then in operation as well as to establish new lines."

The most illuminating of the railroad statements recommending legislative change was delivered on behalf of the Association of American Railroads by Witness W. L. Grubbs before the subcommittee of the Senate Committee on Interstate and Foreign Commerce holding hearings on Senate Resolution 50 of the 81st Congress, 2nd Session. His discussion of the limitations of Section 5(2)(b) commences on page 250 of the published hearings and is concluded at page 252 with the following statement:

> The railroad industry seriously questions the necessity for key-point restrictions in acquisition and in all new certificate cases, to accomplish the statutory purpose. It feels that the Commission has gone far beyond a proper interpretation of the will of Congress as expressed in the proviso of section 5(2)(b) to which I have referred.
>
> *Recommendation*
>
> We advocate that this proviso be so clarified as to preclude such an interpretation and enable it to be plainly understood that conditions should not be imposed which will operate to prevent economical and efficient use of motor vehicles in their service.

We believe this could be done by changing the following language of the proviso:

to use service by motor vehicle to public advantage in its operations—to read:

to provide an improved general transportation service to the public.

Only recently, months after the Interstate Commerce Commission had issued the orders complained of herein, Vice President J. Carter Fort of the A.A.R. testified before a subcommittee of the House Committee on Interstate and Foreign Commerce that "it has been the position of the railroads for years that they should have the same right as anyone else to engage in the trucking business . . . without any special limitations, upon a proper showing of the public convenience and necessity of the proposed truck operation." Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 84th Cong., 1st Sess., on the Report of the Presidential Advisory Committee on Transport Policy and Organization, 1955, p. 129-130.

The foregoing demonstrates that both the Commission and the railroads have believed the former is without authority to grant unrestricted motor rights to a railroad. The Commission has so informed Congress; and the railroads have besought Congress to change the law. Both have understood the law to require a railroad or its subsidiary to prove (1) that the motor operation is in the public interest, (2) that it will not unduly restrain competition and (3) that the motor service will be used to public advantage in the railroads' operations.

Yet in spite of its own decisions, of its reports to Congress, and of urging by railroad spokesmen that the law be amended to broaden the Commission's authority, the Commission here has assumed to grant an extensive, unrestricted motor carrier authority to Motor Transit. If a railroad can be awarded the right to operate as a

motor carrier over hundreds of miles of routes, free of any auxiliary and supplemental restrictions, upon a questionable showing of a public need for the motor carrier service, there is no need for the railroads to urge the amendment of the law. However, as the railroads have pressed for legislative change even after the Commission rendered its decision challenged herein, it would appear to be clear, even to the railroads, that the Commission granted the unrestricted authority to Motor Transit contrary to law.

There is No Valid Precedent for Commission's Action Here.

The Commission concluded its discussion in the report complained of herein with the gratuitious comment, at (R. 116), 63 M.C.C. 108:

> The findings hereinafter made are not to be construed as an abrogation of the policy established in *Kansas City S. Transport Co. Inc., Com. Car. Application, supra.* They represent an exception to that policy justified by the evidence in this proceeding.

However, in the *Kansas City Southern* case the Commission recognized that the language of Section 213 (now Section 5(2)(b)) showed that Congress had not been convinced that the railroads should be given "free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations." No exception to that policy of Congress is permissible as none was provided by Congress itself. *Baltimore & A.R. Co.—Purchase—Bison Lines, Inc.*, 60 M.C.C. 509, 518. As Commissioner Alldredge said in his dissenting opinion, at (R. 119), 63 M.C.C. 111:

> The majority seems to pay some homage to this policy by declaring it to be sound and subject to relaxation "only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue re-

straint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience." Congress, however, has not provided for any exclusions from its declared policy. That is a prerogative of Congress itself.

We anticipate that the Commission, as it did in the court below, will seek to justify its action in this proceeding by citing certain of the handful of cases—distinguishable and relatively unimportant—in which the Commission has attempted to carve out exceptions to the clearly-expressed Congressional policy that railroad applicants may be authorized to conduct trucking operations only in auxiliary and supplemental service. Essentially these were uncontested proceedings before the Commission, and in not a single instance known to these appellants was the Commission's decision in such a case subjected to judicial review. These cases fall largely into three clearly-defined categories.[12]

1. Where truck service is to be rendered to a point not on the line of the railroad and not adequately served by any other railroad or motor carrier. *Santa Fe Trail Transp. Co.—Purchase—Johnson*, 45 M.C.C. 653, 660; *Southern Pac. Transport Co.—Purchase—Reynolds*, 45 M.C.C. 617, 621; *Interstate Transit Lines, Ext.—Verdon, Nebraska*, 10 M.C.C. 665, 667; *St. Andrews Bay Transp. Co. Extension of Operations*; 3 M.C.C. 711, 716.

2. Where truck service is to be rendered over a short and insignificant extension and the existing truck service to which it will be tacked already is subject to appropriate restrictions. *Santa Fe Trail*

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[12]-A fourth group appears to have resulted from a tendency, corrected by the Commission's report in the *Rock Island case, supra*, at 40 M.C.C. 469, "to treat the Barker case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the service which might be rendered by a railroad or its affiliate under any acquired right."

Transp. Co. Extension—New Mexico Points, 48 M.C.C. 85; *Texas & Pac. Motor Transport Co. Ext.—Point, Blue, La.*, 47 M.C.C. 425; *Rock Island Motor Transit Co. Ext.—Wellman, Iowa*, 31 M.C.C. 643.

3. Where the truck service, together with other motor carrier operations, will constitute the major portion of the applicant's business, the rail service having become unimportant. *ET & WNC Transportation Company—Control—The Inter City Trucking Company*, 60 M.C.C. 620; *ET & WNC Transportation Co.—Purchase—Huckabee*, 56 M.C.C. 50; *Louisville, N. A. & C. R. Co.—Purchase—Meerman*, 45 M.C.C. 6.

Even some of the cases cited by the Interstate Commerce Commission and the interveners in its behalf in support of their argument that the Commission's disposition of Motor Transit's application in this proceeding was not at variance from previous policies or practices, reflect the Commission's concern lest the railroads or their affiliates operate motor vehicles in unrestricted, competitive service. Thus in *Santa Fe Trail Transp. Co. Extension—Joplin*, 44 M.C.C. 474, 481, the Commission specifically restricted certain authorized operations "to service which is auxiliary to, or supplemental of rail service" and other operations by reserving the right to impose "such specific conditions as we in the future may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service." In *Santa Fe Trails Stages, Inc. —Control-Central Arizona*, 1 M.C.C. 225, 231, the Commission, Division 5, deemed the grant of authority to result in "an operation auxiliary and supplementary to its rail operations." In *Santa Fe Trail Stages, Inc., Com. Car. App.*, 21 M.C.C. 725, 753, the Commission, Division 5, said of the proposed operations, "Coordination, such as that proposed, has been advocated and encouraged by the Commission and students of the transportation problem for a long time." In *Clinton, Davenport & Muscatine Ry.*

Co.—Ext.—Davenport—Clinton, 24 M.C.C. 250, 251; the Commission, Division 5, noted that "the proposed operation will take the place of an interurban electric railway freight service . . ." And finally in *Burlington Transp. Co. Ext.—Council Bluffs*, 28 M.C.C. 783, 790 the Commission, Division 5, observed that "when operations are commenced over the entire route applicant proposes to utilize the station facilities of the railroad, and coordinate the service with that of the railroad."

In view of the fact that the foregoing decisions contravene the policy of Congress, even though they are distinguishable from the Commission's action herein, appellants do not concede their validity. But, in any event, the all-out truck operations authorized to be conducted by Motor Transit between Chicago and Omaha, serving such additional major points as Cedar Rapids and Des Moines, cannot be squeezed into any one of the three categories of unrestricted motor-carrier authority heretofore awarded by the Commission to rail applicants. Nor do these categories permit of grouping under the broad generalization that the Commission has relaxed the bars to unrestricted truck operations by railroads or their subsidiaries "where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition; and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience." (R. 108), 63 M.C.C. 102.

The precise language of Section 5(2)(b) of the Act and the clear intent of the National Transportation Policy permit of no exception to the bar that has been placed by Congress to railroads' operating trucks except in auxiliary and supplemental service. The Commission's attempts to lift the bar would be of no avail even if the circumstances herein lent themselves, as they

do not, to an accommodation with the exceptions that the Commission has attempted to fashion.

The Conditions Here Imposed Do Not, And Will Not, Limit the Railroad to the Rendition Of Auxiliary and Supplemental Service.

The Interstate Commerce Commission can be expected to attempt to bring the instant case within the framework of the *Kansas City Southern* case by stating, as it did in its motion to affirm, ". . . . it should not be overlooked that the Commission has imposed two conditions upon the motor carrier operating authority which it has given to Motor Transit." (p. 22.) These conditions are "(1) that there may be attached from time to time to the privilege granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require, and (2) that all contractual arrangements between The Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties; . . ." (R. 117) 63 M.C.C. 109. Neither condition would currently limit Motor Transit's operations, or permit the future imposition of restrictions by the Commission to limit such operations to service auxiliary to, and supplemental of, the railroad's train service.

The first of these conditions is couched in the language of Section 208 of the Act, 49 U.S.C. §308, which provides that "there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate [of public convenience and necessity] such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, . . ." The con-

dition imposed by the Commission on the grant of authority herein adds nothing to the powers it already possessed by virtue of Section 208. On the contrary, as Commissioner Arpaia said in his dissenting expression, ". . . condition (1) in the findings is neutralized by the language in the discussion insofar as it adds any qualifications to those set forth in section 208 of the act." (R. 121), 63 M.C.C. 112.

In any event the language of Section 208 has never been held to abrogate the provisions of Section 212(a) of the Act, 49 U.S.C. §312(a). In substance Section 212(a) provides that a certificate of public convenience and necessity may be suspended, changed or revoked, in whole or in part, only after notice and hearing and only for willful failure to comply with the provisions of the Act or the orders, rules or regulations of the Commission promulgated thereunder. ". . . the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in §212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. Smith Bros., Revocation of Order, 33 M.C.C. 465.". *United States* v. *Seatrain Lines*, 329 U.S. 424, 430, 67 S. Ct. 435, 438.

The imposition of auxiliary and supplemental restrictions upon a certificate not previously limited in that respect would be held to be tantamount to a partial revocation of that certificate. Even where the certificate has been subject to an express reservation of the right to impose further limitations, restrictions or modifications to insure that the service remain auxiliary and supplemental, the Commission would not have unfettered power to change the certificate at will but only to accomplish the limited objectives contemplated by the reservation. *United States* v. *Rock Island Motor Transit Co.*,

supra, at 340 U.S. 435, 71 S. Ct. 391. The reservation herein would not permit the future limitation of the authority granted Motor Transit to confine its operations to an auxiliary and supplemental service. As Commissioner Alldredge pointed out in his dissent from the Commission's report and order assailed herein, "The phrase 'public convenience and necessity,' in the context in which it is used in the act, does not comprehend the full public interest in transportation envisaged by congressional policy." (R. 119-120), 63 M.C.C. 111. The general provisions of Section 208, herein repeated as condition (1), cannot be used to modify the specific requirement of the National Transportation Policy that the inherent advantages of all modes of transportation be retained. *United States* v. *Rock Island Motor Transit Co.*, *supra*, at 340 U.S. 436, 71 S. Ct. 392.

The other restriction imposed—"that all contractual arrangements between the Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties"—is equally impotent. The Interstate Commerce Commission, at page 23 of its motion to affirm, said, "the validity of this condition was sustained in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, 436-444." However, these appellants on re-reading the *Rock Island* decision are unable to find any discussion of the restriction and its relationship to the limitation of railroads and their affiliates to insure the rendition of auxiliary and supplemental service. We have found however, that the Interstate Commerce Commission, in referring to the reporting requirement, has said, "In matters relating to compensation between the two companies, the railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be.

. . . Such information might be important in a rate proceeding or otherwise." *Frisco Transp. Co. Extension—Joplin—Miami*, 62 M.C.C. 367, 379; *Texas & Pacific Motor Transport Co. Com. Car. Application*, 47 M.C.C. 753, 763. The ability in the future to enforce an appropriate bookkeeping transaction, we are sure, is not what was had in mind when the Commission undertook the practice of imposing auxiliary and supplemental restrictions in response to the Congressional intent of limiting railroad motor-carrier operations. To jettison the other, more meaningful restrictions, keeping only the restriction that may or may not be of some academic interest and adding a restriction which merely repeats certain statutory authority, cannot be deemed to accomplish the legislative purpose. The restrictions imposed do not, and will not, insure that the Chicago, Rock Island and Pacific Railway Company will use the motor-carrier authority conferred upon its subsidiary, The Rock Island Motor Transit Co., to public advantage in its train operations, and yet under the National Transportation Policy and the provisions of the Interstate Commerce Act that is the limited extent to which it properly may operate motor vehicles for-hire in interstate and foreign commerce.

The Lack of Need for Service by the Railroad Subsidiary

There is No Evidence of Record That There Is Need For the Railroad's Unrestricted Motor Operations Between the Major Points.

While appellants disagree with the ultimate finding by the Interstate Commerce Commission that the public convenience and necessity require the proposed motor common carrier operations of The Rock Island Motor Transit Company, they concede that there was sufficient evidence of record to enable the District Court to sustain the Commission's order insofar as it authorized a bona

fide auxiliary and supplemental service to be rendered to and from such relatively minor points as Brooklyn, Colfax, Marengo, Newton, Oxford, Victor, Walcott and Wilton Junction. The District Court's statement (R. 194) that the so-called "peddle" traffic ". . . is really the traffic which is involved in the pending case" misconstrues the basis for the appeal. However, to the extent that the Commission's order finds that unrestricted service by Motor Transit between such major points as Chicago, Davenport, Cedar Rapids, Des Moines, Council Bluffs and Omaha is required by the public convenience and necessity, appellants contend that the District Court erred in failing to set aside the Commission's order for want of evidentiary support. In short, it is appellants' position that while the record before the Commission supports a grant of auxiliary and supplemental authority such as that embodied in the restricted certificate issued to Motor Transit on September 11, 1951, it supports no more. Findings of the Interstate Commerce Commission of the existence of public convenience and necessity not supported by evidence must be set aside. *Interstate Common Carrier Council* v. *United States*, 84 F. Supp. 414, 422, affirmed *per curiam*, 338 U.S. 843, 70 S. Ct. 91.

Under Section 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. §306(a)(1), no common carrier by motor vehicle subject to the Act may operate on the highways without a certificate of public convenience and necessity. Section 207, 49 U.S.C. §307, provides for the issuance of the certificate on application if the proposed service "is or will be required by the present or future public convenience and necessity." A "finding" of public convenience and necessity was made by the Commission, (R. 116) 63 M.C.C. 108, but to be lawful that ultimate finding must have been based on the proper statutory criteria and must have had the necessary factual findings to

support it. *Interstate Commerce Commission* v. *Parker*, *supra*, at 326 U.S. 64, 65 S. Ct. 1492.

The term "public convenience and necessity" as used in the Act is not defined by the statute, and the difficulty of laying down any general rule by which it can be determined whether or not certificates of public convenience and necessity should be issued long has been recognized. *Cf. San Antonio & A.P. Ry. Co. Construction*, 111 I.C.C. 483, 493. The purpose underlying the requirement of a finding of public convenience and necessity was said by this Court in *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479, 48 S. Ct. 361, 362, to be "to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." This statement of general purpose has been refined into a policy of the Interstate Commerce Commission of fostering sound economic conditions in the motor carrier industry by according existing motor carriers the right to transport all traffic which they can handle adequately, efficiently and economically in the territories served by them. *Clark-Callahan, Inc.*, 41 M.C.C. 693, 706; *Gabler Common Carrier Application*, 21 M.C.C. 713; *C. & D Oil Co., Contract Carrier Application*, 1 M.C.C. 329, 332. As the Court said in *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, 157, affirmed *per curiam*, 338 U.S. 802, 70 S. Ct. 59:

> The Commission has frequently held that under §207 of the Act, 49 U.S.C.A. §307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. Pan-American Bus Lines Operation, 1 M.C.C. 190, 203; Bluenose Bus Co. Ltd., Common Carrier Application, 1 M.C.C. 173, 176; Richard L. Richards, Extension of Operations, 6 M.C.C. 80, 81;

Ohio Transportation Co., Common Carrier Application, 29 M.C.C. 513, 520; Royal Cadillac Service, Inc., Common Carrier Application, 43 M.C.C. 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public "necessity". Inland Motor Freight v. United States, D. C. E. D. Wash. 60 F. Supp. 520, 524. See also Interstate Commerce Commission v. Parker, 326 U.S. 60, 69, 70, 74, 65 S. Ct. 1490, 89 L. Ed. 2051 and dissenting opinion of Mr. Justice Douglas. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. Chesapeake & O. R. Co. v. United States, 283 U. S. 35, 51 S. Ct. 337, 75 L. Ed. 824. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. Interstate Commerce Commission v. Parker, supra. No such finding has here been made, nor is there any evidence to support such a finding.

The record is utterly devoid of testimony showing a need by the public for motor carrier service between the major points along the routes involved—Chicago, Omaha, Des Moines, Tri-Cities, Iowa City, Grinnell, Newton and Atlantic. Yet, based on testimony affecting the very small points between those larger cities, the Commission, with no pretense of finding a public need for service, would grant Motor Transit authority to serve those larger cities in an unrestricted service. The record proves there is no need for such service.

What must have prompted the Commission's action is a misplaced sympathy for Motor Transit. As will be developed more fully, *infra*, p. 65, the Commission's fundamental error was in treating Motor Transit as a separate entity and not as an integral part of the Rock Island family, so that the advantage to Rock Island of having Motor Transit render even an auxiliary and supplemental service to the smaller Iowa points was obscured by the

supposed disadvantage to Motor Transit in not serving the larger points as well.

The Testimony of Shipper and Carrier Witnesses Reveals Ample Service Between the Major Points.

In the instant proceeding the record lends no support to a finding that the public convenience and necessity require the service of Motor Transit between the major points referred to. Witness after witness testifying in support of the application by Motor Transit acknowledged that there was no need for such service. For example, Judge Carl Reed, Chairman of the Iowa State Commerce Commission, testified that service to the larger communities such as Davenport, Des Moines and Omaha was adequate, and that his Commission had no complaints regarding service to such points. (R. 744-745). Similar acknowledgements were made by virtually each of the shipper and Chamber of Commerce witnesses. In short, out of the multitude of more than 150 witnesses offered by Motor Transit in support of its application not one gave the slightest indication of a need for this type of service.

A representative of the Chicago Association of Commerce and Industry, testifying for applicant, observed that, "We have approximately four hundred common carrier truck lines out of Chicago and there is plenty of service to the larger points." (R. 247). This witness referred to a motor carrier directory which named twenty-two carriers serving Davenport from Chicago (R. 251-252); ten among those serve Iowa City; at least four serve Grinnell (R. 252); at least nine serve Newton (R. 255); and at least six serve Atlantic. (R. 256). The witness stated that there is "probably not" any demand for additional motor carrier service between Chicago and Omaha. (R. 253). Other witnesses for Motor Transit

also testified as to ample service to and from the larger points.

A representative of the Davenport Chamber of Commerce knew of twenty-seven motor carriers operating between Chicago and the Tri-City (Davenport, Moline and Rock Island) area and rendering good daily service. (R. 234).

A representative of the Cedar Rapids Chamber of Commerce was aware that at least fifteen motor carriers operate between that city and Chicago (R. 1124).

A representative of the John Deere Plow Company admitted that there was no difficulty experienced in getting service to points such as Des Moines and Omaha. (R. 469).

A representative of the Omaha Chamber of Commerce was able to recall the names of eight substantial motor carriers having a service between Omaha and Chicago which he described as a "regular established service". (R. 1361). He knew of four substantial carriers serving Omaha from Twin-Cities (R. 1365). Regular service exists between Kansas City and Omaha. (R. 1365).

A representative of the Iowa City Chamber of Commerce described the available trucking facilities as one of the city's "outstanding attractions." (R. 485).

Representatives of several motor carriers rendering service in the area involved presented testimony at the hearings. The testimony of just three of these is summarized in Appendix B to further demonstrate that the record reveals ample service between the major points.

There is no evidence in the record to buttress a finding of public need for additional service at the larger points. Any conclusion reached by the Commission that there is a public need for more motor carrier service at such points is not supported by basic facts and, on the con-

trary, is actually refuted by the testimony of witnesses testifying on behalf of Motor Transit, and the independent motor carriers as well.

The Commission's Failure to Guard Against the Danger of the Development of a Rock Island Monopoly

The Railroad Would Sustain Its Trucking Subsidiary With Freight, Facilities, Funds and Personnel.

This Court, in the *Parker* case, *supra,* at 326 U. S. 73, 65 S. Ct. 1497, clearly set forth the Commission's continuing obligation, in dealing with applications by railroads or their affiliates to perform motor-carrier service, "to guard against the danger of the development of a transportation monopoly." It would be difficult to imagine a record which more strongly evokes the need for strict adherence by the Commission to this admonition than that herein—or one in which it has been so completely ignored.

Motor Transit possesses at least four distinct competitive advantages to which no independent motor carrier can successfully aspire.

First, the policy of the Iowa State Commerce Commission in granting intrastate monopolies insures that only Motor Transit can render intrastate motor carrier service between the Iowa points and along the routes herein involved. (R. 98, 114), 63 M.C.C. 94, 107. Second, Motor Transit receives rail-billed traffic from its railroad affiliate to swell its volume, fill empty space in its trucks and increase its revenues. (R. 113), 63 M.C.C. 106. Third, at many points where no Motor Transit representative is stationed the railroad depot agent assumes his functions. (R. 111); 63 M.C.C. 104. Fourth, and probably most important of all, whereas independent motor carriers must conduct their financial affairs within the rigid confines of economic reality, Motor Transit, as revealed by its an-

nual reports to the Commission, is able, through heavy subsidization of the parent railroad, to obtain huge sums to finance equipment purchases and similar transactions. (R. 104), 63 M.C.C. 99.

The advantages accruing to Motor Transit over its independent motor carrier competition through receipt of rail-billed traffic are obvious. Included are the opportunity to operate vehicles at maximum efficiency, with resultant higher revenues and profit, a choice of rates (rail or motor) given the shipper, and, of course, more traffic. Another obvious advantage in receiving this traffic is the opportunity it gives to achieve a balanced movement, the importance of which is indicated by the opinion of Motor Transit's General Manager, "You haven't a chance if you can't balance your operations." (R. 1408-1409).

One witness' testimony is of particular value in demonstrating the practical advantage to a carrier which can maintain a representative or agent continually available for contact in a town. (R. 800-804). Admittedly it is not economically feasible for Motor Transit or any other motor carrier to maintain an agent at every point which it might have authority to serve. But Motor Transit does have this advantage: at many of the points which are too small to justify maintenance of such a representative, the railroad depot agent performs the function without apparent cost to Motor Transit. At Dexter, Iowa, for example, the railroad station agent accepts payments due Motor Transit, and claims may be made through him. (R. 1188). Other examples of points where this strategically advantageous situation exists are Altoona (R. 865), Atalissa (R. 956), Ladora (R. 455), Mitchelville (R. 829), and Wilton Junction, (R. 961). The record reveals numerous others.

The Commission itself is obviously cognizant of this tremendous advantage as seen from the comment in its report, "Motor Transit is able to provide such complete

service because it maintains freight agents at many points on its routes and the other motor carriers have them located at some of the larger points only." (R. 111), 63 M.C.C. 104. These agents, however, are railroad freight agents available to Motor Transit only because of its affiliation, and insofar as the record shows, are a great advantage obtained *at no cost* to Motor Transit.

Indicative to some extent of the financial support given Motor Transit by its railroad parent is the fact that as of January 31, 1952, advances to Motor Transit payable to Rock Island totalled some $837,527. (R. 97), 63 M.C.C. 94. The Commission's report admits the existence of this financial assistance. (R. 104), 63 M.C.C. 99. Among independent motor carriers such an advance would be deemed to be very large and of great benefit.

It is sufficient here to point out that "all of the capital for the Rock Island Motor Transit Company has been provided by the railroad, either by purchase of common stock, or in the way of advancements by loans or otherwise". (R. 1399).[13] And thus the applicant is relieved from facing the economic facts of life which independent motor carriers must look straight in the eye. What is additionally apparent is that the railroad has achieved substantial savings by using its affiliate as a substitute for way-freight service (R. 213)—and now seeks to profit further by using that affiliate in unrestricted motor carrier operations, which profit can only be derived by diminishing the revenues of independent motor carriers.

Many other advantages arise by reason of this dual status of Motor Transit, the joint use of communications systems being but one. (R. 853). Another disclosed by the record is the extensive use by Motor Transit of Rock Island's freight houses, some of which are used only by

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[13] Rock Island's President testified regarding railroad loans for the purchase of motor carrier equipment. (R. 218).

the motor carrier and not by its principal. (R. 226). Yet another is the opportunity to balance traffic which is predominantly eastbound by rail and westbound by motor carrier. (R. 1417-1418).

In addition, something should be said respecting the criticism by the Commission of the independent motor carriers which, it is indicated, have failed to provide adequate service to the small Iowa points involved. Without admitting the gravity of the failure alleged, it is proposed to explore a reason for the situation. Strangely enough, the Commission does not seem to consider it of any importance that these independent motor carriers, unlike Motor Transit, have no indulgent parent, ever ready to supply the wherewithal in money, equipment and labor necessary to undertake the motor vehicle service rendered, with little or no regard to the cost of performing such service. In this proceeding it may be entirely true that the independent motor carrier protestants, because of the economic reality that they must profit or die altogether, could not match the service sought to be provided by their subsidized competitor. Indeed, the Commission's report itself seems to recognize that the underlying basis for the failure of the independent motor carriers to render a greater service to the smaller Iowa points is the simple fact that, in contrast with Motor Transit, they are rarely tendered freight by the shippers involved. (R. 111) 63 M.C.C. 104. Be that as it may, the criticism of their alleged service failures by the Commission seems largely unjustified when it is recognized, as it must be, that the service afforded by Motor Transit is made possible only by raiding the coffers of the parent railroad, and by the intrastate monopoly granted it by the Iowa State Commerce Commission. A combination of these two factors comprises, in effect, a raid upon the independent motor carriers, forcing them into an economic and service straitjacket.

The record herein leaves a good deal to be desired in the way of details of the financial arrangements between Motor Transit and its parent, the Chicago, Rock Island and Pacific Railway Company. Witnesses were not too helpful in supplying such details. An investigation by the Commission into these matters might have proved very revealing. In the absence of such investigation the appellants herein, in their petition for reconsideration of the Commission's report, invited the attention of the Commission to Motor Transit's last annual report, for 1953, filed with the Commission. Of course, the Commission could have noted officially the content of that report. *Market St. Ry. Co.* v. *Railroad Commission*, 324 U.S. 548, 562, 65 S. Ct. 770, 777.

Schedule 9002 of that annual report, listing the salaries of the officers and directors of Motor Transit, shows that more than 93 percent of total salaries of eleven general officers are paid by the railroad. The total salary ($75,000) of the president of Motor Transit is assumed by the railroad. As a matter of fact, the only expenditures charged against the motor carrier for the payment of salaries of its officers are portions of the salary of one of the vice presidents and the general manager, totaling $11,700.00. The parent railroad, on the other hand, pays $168,006.83 in salaries to these officers of its motor subsidiary.

Schedule 9009, covering contracts and agreements with affiliated companies, reveals that the parent railroad has agreed to transport the freight of Motor Transit for 1¼ cents per ton-mile. Assuming that the payload capacity of the subsidiary's vehicles is 15 tons, this means that the transportation cost to the subsidiary is 19 cents per truck-mile (without regard to the classification of the tonnage) whenever the parent railroad performs the service covered by the contract referred to. In these days of high operating costs, when the average motor carrier

cost is 51 cents per truck-mile,[14] Motor Transit is fortunate indeed to make such a bargain. And, when it is considered that the charge involved probably includes loading and unloading paid for by the parent railroad, the arrangement is found to be truly gilt-edged so far as the motor subsidiary is concerned.

The figures reflecting operations and maintenance expenses (Schedule 4000 in the Annual Report Form, but consolidated for passenger and property expenses and labeled "Schedule 4002" by Motor Transit) indicate that the motor subsidiary incurred operating rents of $18,022.00. Considering that it operates 6,049 route miles in inter-city service (Schedule 9001), grossed $5,677,962.00 in 1953 (Schedule 2930-A), and makes extensive use of the terminals of the parent railroad at nearly every city, town or hamlet covered by its operating authority, it would appear that the rentals it pays to the parent railroad do not begin to represent fair charges for use of the property involved.

Finally, Schedule 2200, Advances Payable—Affiliated Companies, emphasizes the extremely openhanded policy of the railroad toward its motor subsidiary. Listed are a so-called demand note for $400,000 and an "open account," also for $400,000, covering monies owed the railroad by Motor Transit. The demand note, issued September 1, 1943, bears interest at the rate of 4%. Its age clearly indicates that the railroad is obviously in no hurry to "demand" repayment, but what is more important is the fact that no lending institution would make such a loan to an independent motor carrier unless it were fully secured by mortgage of its operating property. The "open account" referred to, on which Motor Transit pays not one penny interest, seems nothing less than a

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[14] Interstate Commerce Commission, Bureau of Transport Economics and Statistics, *Statistics of Class I Motor Carriers for Year Ended December 31, 1953*, page 39.

generous handout by the railroad to its prodigal offspring.

Having demonstrated that the applicant in this proceeding is heavily subsidized by its parent railroad, the all-important question comes naturally to mind: Does the Commission propose, in every case in which independent motor carriers are unable to match the subsidized competition of rail subsidiary motor carriers, to authorize unrestricted service to such subsidiaries on the ground that the shipping public has an inherent right to receive more than a dollar's worth of such service for every dollar spent, so long as the parent railroad is willing to pick up the tab for the difference? Even assuming the Commission's power to issue unrestricted certificates to railroad subsidiaries, fundamental fairness would seem to require that it first be fully informed with respect to the cost of service proposed to be rendered, and, fortified with such information, be prepared to require that each competitor for the traffic involved stand on an equal footing with the other to secure it.

We submit such unfair competition, destructive of the inherent advantages of truck transportation, was what the Congress clearly intended to prevent, and the facts of record, although incomplete, amply support the legislative wisdom.

The Annihilation of Independent Motor Carriers Would Confer a Monopoly Upon the Railroad.

The record clearly demonstrates that independent motor-carrier competition along the involved Iowa routes has already been restrained. Complete freedom in motor carrier operations by the Rock Island's subsidiary will unquestionably insure an even greater restraint than now exists.

Admittedly, the Commission has recognized in its decision that prerequisite to approval of the application

herein must be a finding that competition will not be restrained. It said:

> The main purpose for the policy of imposing the five above-quoted restrictions, or modifications thereof, was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. (R. 108), 63 M.C.C. 102.

However, the conclusion was reached that:

> Thus the operations of applicant have not unduly restrained competition, and there is no evidence that its proposed operations would produce such a result. (R. 113), 63 M.C.C. 106.

This finding is simply not in accordance with the facts, and indeed the record proves precisely the opposite.

Motor Transit's officials are cognizant of their dominant position as proved by the comment of its General Manager. "Yes, we have both the intrastate and the interstate authority in this area, and if you didn't have the combination of the interstate, the intrastate, the truck billing, and the rail billing, you just couldn't even begin to get started to maintain the cost of operation." (R. 1388). Since no independent motor carrier has all this, Motor Transit by this application is seeking to seal tight its present near-monopoly. But compare the above admission with the same witness' pious protestation:

> . . . I am sure on an equal basis that we can hold our own. We don't ask for any advantages. All we ask is to be on an equal basis. (R. 1409).

The Commission apparently accepted this view. But, in fact, the only way to achieve an "equal basis" would be for Motor Transit to surrender its intrastate monopoly, or for the State of Iowa to grant intrastate rights to the independent motor carriers. Since both these ends are impossible to appellants, the idea of "equal" competition is unrealistic, untrue and preposterous.

The privilege of doing intrastate business is an advantage distinct and readily apparent to an interstate carrier.[15] A number of the witnesses herein have testified to shipping both within the State of Iowa and beyond. If only one carrier can be offered the intrastate traffic, can it be disputed that this same carrier automatically obtains a tremendous competitive advantage on traffic moving outside the state either simultaneously or at differing times? Nor can it be denied that the volume and revenue so gained can enable the monopolizing carrier to conduct a better balanced, more efficient and, therefore, a more profitable operation than its independent competitor could hope to achieve on the same route.

One is moved to observe that the Commission in this proceeding is permitting itself to be dominated by the Iowa Commission's policy of intrastate monopoly. Because only Motor Transit is favored along these routes by that policy, it is to become favored also by the Federal Commission by removal of those restrictions which would tend to insure its interstate use only in operations auxiliary to or supplemental of those of its parent railroad. The Commission's report observes, "that such peddle operations could not be profitably operated with interstate traffic only." (R. 114), 63 M.C.C. 107. Therefore, it concluded, we must remove all restrictions from the Iowa Commission's nominee—a railroad affiliate—to increase further its stranglehold on the motor carrier traffic to the smaller points in the area.

The Commission Committed a Fundamental Error.

The fundamental error which led the Commission to completely reverse its settled construction of the law rests on a dual basis: first, its peculiar inability, or

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[15] As one witness observed, "where we have our interstate shipments and intrastate both delivered by the same carrier, it makes it a convenience to us." (R. 786).

unwillingness, to view Motor Transit in its true light; second, its failing memory respecting the purpose of the railroad's original entry into the field of limited motor transport. Somewhere along the tortured path of these proceedings, sometime during the more than fifteen years which elapsed between the filing of the White Line and Frederickson applications and the decision complained of herein, the Commission seems to have lost sight of both those facets of this case. But when they are viewed in their proper light, the situation comes into focus.

Motor Transit is a railroad subsidiary. By the grant here opposed, it would become the unrestricted alter ego of the railroad between two major cities, Chicago and Omaha, separated by approximately 500 miles.[16] As a captive motor carrier, it would compete with the railroad and with the independent motor carriers between important cities over great distances. By failing to recall Motor Transit's true nature, the Commission has convinced itself that the rail subsidiary's desire to perform a completely independent motor carrier service has merit sufficient to warrant its ignoring the statutory mandate against granting such authority. Had it remembered what Motor Transit is, and the great growth of its parent, it might have weighed the affected transportation equation in its entirety.

The Commission expresses solicitude for the claimed plight of the parent railroad when it states, (R. 113), 63 M.C.C. 106, that its less-than-carload traffic has consistently declined over a five-year period, while in the same breath admitting that Motor Transit's tonnage has

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[16] Actually, this understates the magnitude of the authority which the Commission would grant. As pointed out at page 9, *infra*, the rail subsidiary, through "tacking," could also perform unrestricted operations between other major points.

increased. And this concern over the declining l-c-l tonnage—costly to perform and usually shown as a deficit figure in Commission statistics—is nowhere matched either by pertinent inquiry or by comment as to the railroad's fortunes in the transportation of carload traffic which is the fiscal lifeblood of any railroad operation. Had the Commission's preoccupation with the alleged financial predicament of the applicant not been so intense, a look at the carload tonnage figures would have quickly disabused its thinking respecting the claimed need to carve out such a massive exception to the *Barker* and *Kansas City Southern* cases, *supra*, as it professes to find in this proceeding. From 1940 to 1952, the year the hearings were held in the latest phase of this seemingly endless proceeding, the parent railroad's carload tonnage increased from almost 24 million tons to 42½ million tons. Over this same period the revenue accruing from the transportation of this carload tonnage rose from sixty-five million dollars to nearly one hundred eighty million dollars, an increase of nearly 300%![17] In these circumstances, the bleating plea of poverty of the subsidiary of this well-to-do transportation giant should have fallen on extremely deaf ears.

Moreover, the Commission seriously erred in ignoring completely the purpose of the railroad's entry into the motor carrier business. As the earlier reports of the Commission in this proceeding demonstrated, the ostensible purpose of allowing the railroad to perform *any* motor carrier service was to permit it to substitute the more efficient motor truck for obsolescent way-train and peddle car service theretofore performed by the railroad itself. But the Commission forgot this reason for making the grant to the railroad and became preoccupied with

[17] Source: Freight Commodity Statistics, Class I Railways in the United States, published by the ICC's Bureau of Transport Economics and Statistics.

the alleged costly nature of the peddle service by Motor Transit which in turn motivated its grant of authority to that carrier to perform volume service between points as to which the record clearly shows there is already adequate service. Since the cost of this peddle truck service is less than the cost of performing the inefficient rail service it has replaced, it is obvious that there is no reason for going further and granting a wholly unrestricted motor service, completely unrelated to the rail service. Thus the Commission, over the protests of independent motor carriers, has placed the railroad in a position to compete effectively with the former for small-lot traffic while retaining its dominant position with respect to volume tonnage. In this manner, it seeks to bestow its largesse upon the Rock Island family through an unprecedented grant of authority to Motor Transit to perform completely unrestricted truck service throughout the length and breadth of the Rock Island empire. A better case could not be found to illustrate the wisdom of the Congressional mandate against allowing just such motor carrier operations by the railroads.

The Commission's fundamental error here is sharply exposed by its earlier thinking, as set forth in its brief in the *Texas and Pacific* case:[18]

> **The difference between the *Parker* case and the case now before the Court is that, in the former, the railroad subsidiary was defending its right to perform a closely coordinated l.c.l service in substitution for way-train service against the contentions of non-railroad motor carriers that even such restricted service was an encroachment on their field of transportation, whereas, in the present case, the railroad subsidiary, having crossed the line of permissible and nonpermissible motor service open to railroads is in effect insisting that it is its right to fully enter into**

[18] Joint brief of the Commission and the United States in No. 38, *U.S.* v. *Texas and Pacific Motor Transport Co.*, October, 1950, Term.

the motor carrier field. Transport supported its applications on the basis of the economies, more efficient and expeditious service, that would result from the use of motor for train service. It then used the limited authority granted to cross the line into the field of general motor carrier operations. Thus it revealed the trend toward monopoly which Congress feared and guarded against by enacting section 213 (now sec. 5) and by making it the Commission's duty to administer the Act so as to preserve the inherent advantages of each mode of transportation.

As previously stated, the Commission's decision herein abruptly reverses its consistent interpretation, followed for many years, of the pertinent provisions of the Interstate Commerce Act and the National Transportation Policy. In addition, it is grossly unfair in its effect upon the operations of numerous independent motor carriers authorized to serve between the major points directly and indirectly involved.

The conclusion is inescapable that the grant of authority which would enable the rail subsidiary to perform unrestricted motor-vehicle service between such major points as Chicago, Omaha, Des Moines, Kansas City and Minneapolis-St. Paul, without a scintilla of evidence in support thereof, is nothing more than an effort by the Commission to penalize the independent motor carriers for their alleged failure to render sufficient service to the small Iowa points involved. We have previously discussed the handicaps under which the independent motor carriers labor in their efforts to compete with the subsidized operations of the rail subsidiary, buttressed by the intrastate monopoly conferred by the Iowa Commerce Commission. But aside from that aspect of the case, the Commission's award of authority to the rail subsidiary to perform unrestricted motor service between major points as to which its own witnesses denied there was need for added motor carrier service, brings about completely incongruous results.

Assuming, *arguendo*, that the independent motor carrier appellants have, without excuse, failed to render proper service to the small Iowa points involved, the Commission's grant of authority to Motor Transit to serve the major cities nevertheless does not stop at "punishing" them. Its punitive effects go a lot deeper. Its action also severely harms the interests of other independent motor carriers authorized to provide service to some or all of the major points involved, which lack authority to serve the Iowa points on the White and Frederickson routes. The Commission made no finding in this proceeding that *all* independent motor carriers serving Chicago, for example, have failed to provide adequate service to other points authorized by their franchises. Yet all such carriers, whether or not they are authorized to serve the small Iowa points, are to be abruptly faced with the prospect of dual competition for Chicago traffic by the railroad, on the one hand, and the unrestricted trucking operations of the railroad's subsidiary, backed by all its parent railroad's financial resources, on the other.

Although the Commission took pains to point out that its decision under review herein is "not to be construed as an abrogation of the policy established in *Kansas City S. Transport Co., Inc., Com. Car. Application*," (R. 116), 63 M.C.C. 108, we sincerely doubt the Commission's ability to make its words stick. If its decision is allowed to stand, the Commission will shortly be presented with requests for unrestricted truck operating authority by the *rail* competitors of the Rock Island, which it will be unable to resist. The ability to conduct all-out truck operations will be a potent competitive weapon in the hands of the Rock Island Railroad, not only with respect to its independent motor carrier competitors, but also as respects its railroad competition. What then, would the Commission, having placed this weapon in the Rock Island's hands, say to one of its *rail* competitors seeking

equal treatment. To the railroad whose traffic was being diverted to the Rock Island by virtue of its ability to offer all-rail, all-motor, or a combination rail-motor service, throughout its territory, would the Commission, in effect, say: "No, we allowed Rock Island to perform unrestricted truck service only because it was able to satisfy us that certain independent motor carriers failed to render a satisfactory service to some small points also served by the Rock Island. Unless you can make a similar showing, we cannot allow you to institute unrestricted truck service in order to better compete with the Rock Island." We think such an answer highly unlikely. To the contrary, we believe the Commission would feel constrained to allow the Rock Island's rail competitors equal opportunity to perform all-out motor operations. And bearing in mind the overlapping of railroad systems throughout the country, it would be only a short time until all railroads would claim a need to perform such service in order to stay competitive with other railroads.

Need For Reexamination of the *Parker* Doctrine

The imposition of a restriction limiting Motor Transit in its operations between designated key points, prohibiting service to, through or from more than one of the named points, would not assure the rendition of an auxiliary and supplemental motor service. If the service is to be a purely auxiliary and supplemental service, then in the words of Mr. Justice Douglas, dissenting in *Interstate Commerce Commission* v. *Parker*, *supra*, at 326 U.S. 77, 65 S. Ct. 1498, ". . . let the service be limited to commodities which have a prior or subsequent rail haul." In his dissenting opinion therein Mr. Justice Douglas, at 326 U.S. 75, 65 S. Ct. 1497, said:

> If, as the Commission at first required (Kansas City Southern Transp. Co., 10 M.C.C. 221), this motor carrier service was restricted to goods which had a

prior or subsequent rail haul, the service might properly be designated as an auxiliary or supplemental one. But the Commission changed its position and withdrew that condition. Kansas City Southern Transp. Co., 28 M.C.C. 5. The key-point condition was substituted. Between those points the railroad will operate like any motor carrier. The service which it seeks to render is not a combined rail-and-truck service. As the Commission states in its report in the present case, "The railroad, through its subsidiary, merely seeks the substitution of a more efficient for a less efficient means of service." This "substituted" service differs from the adequate, independent motor carrier service already existing only in its being under railroad control. In that respect and in that respect alone is the service of a new and different character.

The absence of any statutory or I.C.C.-determined standards for the establishment of key points, together with the ease of securing Commission authority for the modification of whatever key-point restrictions may be imposed, makes it clear, as was implicit in Mr. Justice Douglas's statement, that the imposition of key-point restrictions is inadequate to insure the rendition of an auxiliary and supplemental service by a railroad-affiliated motor carrier. The most notorious and one of the most recent examples of how the naming of key points can become a mere rhetorical exercise occurred in the proceeding in which the Commission approved the purchase by Pacific Motor Trucking Company, a wholly-owned subsidiary of the Southern Pacific Company, of the franchise and property of Pacific Freight Lines, which at the time was the largest independent motor carrier operating in the State of California. The applicant for Commission approval, in the face of the vigorous protests of motor carriers serving the area, consented to the designation of certain suggested key points. Of these the Commission in its report and order in Docket No. MC-F-5783, *Southern Pacific Company—Control; Pacific Motor Trucking*

Company—Purchase—Pacific Freight Lines, 70 M.C.C. 5, dated June 4, 1956, and served June 26, 1956, said:

> Furthermore, it appears such points, other than Santa Barbara, are rather small, the population of Harold, Newhall Ranch, and Vernalis apparently consisting of less than 300 persons. There is no indication that any of such points have facilities adaptable to the operations proposed under the unified rights or that such smaller points have any justified basis for selection as key points. Considering that PMT could perform a through operation under the key points, it proposes from points in the San Joaquin Valley to points in the Imperial Valley, approximately in some instances distances of 600 miles, it is apparent that the key points selected by applicants would permit operations unrelated to the rail operations of So Pac, and competitive with its rail operations and operations of existing motor carriers.

Nevertheless, by "corrected" sheets issued June 27, 1956, the Commission approved the imposition of those very key points. What made the Commission's abuse of its discretion particularly callous was its complete disregard of the Examiner's conclusion that the basic reason for the acquisition by Pacific Motor Trucking Company of the operating rights of Pacific Freight Lines was to remove a substantial operator from the field of competition by independent motor carriers. At sheet 15 of his proposed report the Examiner had said:

> The very liberal consideration to be paid in the transaction might be warranted from the standpoint of the purchasers, by removing PFL, one of the largest, if not the largest motor carrier in the Pacific Coast area, as a formidable competitor of PMT and its parent railroad, which appears to be the primary objective of the proposal.

Not only did the Commission completely ignore the Examiner's conclusion that the purchase would not be in the public interest, but in approving the purchase the Commission imposed key-point restrictions that would be

wholly ineffectual in confining the Pacific Motor Trucking Company's operation of the rights acquired from Pacific Freight Lines to service auxiliary and supplemental of the train service of the Southern Pacific Company.

In Docket No. MC-30605, *The Santa Fe Trail Transportation Company—Petition for Modification of Certificate*, 64 M.C.C. 461, the Commission removed Dodge City, Kansas, as a key point, thereby allowing the motor-carrier subsidiary of the Atchison, Topeka and Santa Fe Railway Company to "operate like any motor carrier" between Wichita, Kansas, on the east, and Pueblo, Colorado, on the west. The Commission at 64 M.C.C. 469-470, said:

> No doubt petitioner [Santa Fe Trail Transportation Company] and Railway could change their present pattern of operations and thus effect some operating economies; however, we doubt if little could be accomplished in the way of operating economies or efficiency so long as the Dodge City key-point restriction remains in effect, because the most practical route for the movement of the greater portion of available traffic is over highways that pass through Dodge City. The evidence is convincing that removal of this restriction would result in substantial benefit of petitioner and the supporting shippers. True, its removal would enable petitioner to provide all-truck service for distances of 500 miles or more, and more effectively to compete with the independent motor carriers; however, the all-truck service would not result in any substantial diversion of traffic . . .

The Commission's liberality in modifying such key-point restrictions as it may impose and its haphazard designation of key points to begin with have enabled such railroad-affiliated carriers as Pacific Motor Trucking Company and Santa Fe Trail Transportation Company to rank among the biggest motor carriers in the country. Pacific Motor Trucking Company is, revenue-wise, the tenth largest motor carrier of property having had oper-

ating revenues in the year 1956 of $29,071,328, and Santa Fe Trail Transportation Company is the 46th with 1956 operating revenues of $11,997,175. Surely these railroad-affiliated motor carriers would not have grown to such awesome proportions if their operations had, indeed, been effectively restricted to service auxiliary to, or supplemental of, the train service of their parent railroads. Their size alone would seem to bear testimony to the inefficacy of the key-point manner of restricting their service. Only the imposition of prior or subsequent rail haul restrictions would assure that railroad-subordinate motor carriers confine their activities in aid only of the rail operations. Such a restriction should be a condition in every grant to a railroad or an affiliated motor carrier to render motor service, whether by acquisition under section 5(2) or by application under section 207. As Mr. Justice Douglas said so concisely, ". . . let the service be limited to commodities which have a prior or subsequent rail haul."

In short, the recent history of the Commission's administration of the provisions of the National Transportation Policy and the Interstate Commerce Act relating to railroad operation of motor vehicles indicates that it has abandoned its obligation, set forth in *Parker, supra,* at 326 U.S. 73, 65 S. Ct. 1497, "to guard against the danger of the development of a transportation monopoly." The time has come, we believe, for this Court to forcefully remind the Commission of this mandate and to take steps to insure that it is faithfully obeyed, in this case and others of similar nature which may follow. The most appropriate method by which this Court can achieve this objective is to require the Commission in this case, and others which involve rail use of motor vehicles, to impose, as a minimum, a restriction limiting such use to the transportation of shipments having a prior or subsequent rail haul. Only by such a holding can the Court insure that the Congressional policy intended to main-

tain and promote a healthy, independent, motor carrier industry, will not become a dead letter.

Wherefore, it is urged that the judgment of the District Court be reversed and the case remanded to the District Court with instructions to set aside the Commission's report and order insofar as it authorizes Motor Transit to render service not confined to auxiliary and supplemental operations and for disposition otherwise consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the twenty-sixth day of August, 1957, I served copies of the foregoing document on the several parties herein as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Oliver Gasch, United States Attorney for the District of Columbia, at Room 3600-A, United States Court House, Washington, D. C., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with postage prepaid, to Robert Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Rock Island Motor Transit Company, intervening defendant, by mailing a copy in a duly addressed envelope with airmail postage prepaid, to A. B. Howland, Esq., its attorney, at 500 Bankers Trust Building, Des Moines 9, Iowa.

4. On the Employees' Committee of Rock Island Motor Transit Co., Davenport Chamber of Commerce, et al., and Shippers' Committee, intervening defendants, by mailing a copy in a duly addressed envelope with airmail postage prepaid, to D. C. Nolan, Esq., their attorney, at Suite 405, Iowa State Bank Bldg., Iowa City, Iowa.

5. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen, intervening plaintiffs, by mailing copies, in a duly addressed envelope, with post

age prepaid; to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

6. On the National Industrial Traffic League, *amicus curiae*, by mailing a copy in a duly address 1 envelope, with airmail postage prepaid, to John S. Burchmore, Esq., its attorney, at 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY

APPENDIX A

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

SEC. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.*] [*49 U. S. C. § 5.*]

* * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the

Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Sec. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C., § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle

on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued

under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Commission shall issue a certificate authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certi

~~ficate shall be lawful. Any carrier which, on the date this~~ subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with section 207 (a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C., § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules,

and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. [*August 9, 1935.*] [*49 U.S.C., § 308.*] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory speci-

fied in the certificate, as the development of the business and the demands of the public shall require.

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. [*August 9, 1935, amended June 29, 1938, September 18, 1940.*] [*49 U.S.C., § 312.*] (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may

be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

APPENDIX B

C. A. GRACEY

(Record pp. 1502-1580)

Mr. Gracey is Vice-President of the Iowa-Nebraska Transportation Company, Inc. (R. 1502). The principal office and one of its terminals is located at Avoca, Iowa, one of the points included in applicant's request for authority. (R. 1503).

The company in addition to its Avoca terminal has terminals located in New York, New York, Chicago, Illinois, Des Moines, Iowa, and Omaha, Nebraska at which points it maintains full time employees and provides pick up and delivery service. In addition to said terminals the company maintains agents at Davenport, Iowa City, Cedar Rapids, Marshalltown, Sioux City, Ames, Nevada, and Boone, Iowa. These agents are independent cartage companies and make the pick ups and deliveries at said points. (R. 1504).

The company has authority to and is presently serving in interstate commerce all points located in the State of Iowa situated on U.S. Highway 6 and Omaha, Nebraska. It conducts an operation over Iowa Highways 83 and 64 between Atlantic, Iowa, and Omaha, Nebraska, serving all intermediate points. It operates between Cedar Rapids and Iowa City over U.S. Highway 218. (R. 1506).

The company is providing peddler service to points lying along U.S. Highway 6 and over Iowa Highways 83 and 64. It is also providing peddler service to Cedar Rapids, Iowa City and intermediate points on U.S. Highway 218. (R. 1507). To all of these points it provides delivery service and pick up service where traffic demands it. It handles interline freight for delivery at these points originating at Chicago, Des Moines, and Omaha. Likewise it turns over to connecting lines at

Chicago, Des Moines, and Omaha freight that is destined to points beyond its line which is picked up in these various communities. (R. 1508). It renders service on L.T.L. shipments as well as truckload shipments to all points. (R. 1509-1510).

Exhibit #30 lists the shipper witnesses who appeared in support of the application from various towns involved. (R. 1928). Of these the Iowa-Nebraska Transportation Company serves Adair, Altoona, Anita, Atlantic, Casey, Cedar Rapids, Colfax, Coralville, Council Bluffs, Davenport, Des Moines, Dexter, Durant, Grinnell, Harlan, Ladora, Marne, Marengo, Menlo, Mindon, Mitchellville, Newton, Neola, Oakland, Stuart, Tiffin, Underwood, Walnut, and Wilton Junction, Iowa. Referring to the list of witnesses from each town, witness testified that he was familiar with many of the names and that they were consignees rather than shippers and that his company served many of them. In most cases it is on less than truckload shipments. (R. 1510-1511).

Exhibits No. 31, 32 and 33 are lists of representative shipments indicating the services that have been performed from September 27, 1951 to April, 1952, by the company, for the communities involved in this application. (R. 1939-1956). These exhibits were prepared from delivery sheet records and the underlying data made available to all those present in the hearing room. (R. 1511). Exhibit 31 covers shipments originating in Omaha destined to the communities involved, (R. 1512), Exhibit 32 covers the same type of shipments originating at Des Moines (R. 1512), and Exhibit 33 the same out of Chicago. (R. 1513). It should be noted that as here used the word origin means either point of origin on Iowa-Nebraska Transportation lines or origin through connecting line source. (R. 1513).

The equipment of the company in the great majority of cases is being used to full capacity. In the event that

additional equipment should be necessary to handle any increased demands for service in the territory, the company is in a position and is willing to add such needed equipment. Mr. Gracey did not know of any occasions where freight was destined to or originated at any points involved in this application where the company refused or otherwise neglected to pick up the shipment. (R. 1515).

JOE BOS

(Record pp. 1638-1664)

Mr. Bos is president of the Bos Truck Lines, Inc. with headquarters at Marshalltown, Iowa. (R. 1638). It is authorized to serve all intermediate points located on U.S. Highway 6 in the State of Iowa. (R. 1639-1640).

The company owns sixty trailers, forty tractors and seventeen straight trucks and does some leasing besides. (R. 1640). It has terminals located in Chicago, Marshalltown, Des Moines and Omaha. (R. 1640).

The company renders a daily service between Chicago and Omaha over both U.S. Highway 6 and 30. It always has one or two trucks daily on U.S. 6 out of Omaha to Des Moines and two or three trucks out of Chicago to Des Moines on U.S. 6. It runs about six to seven trucks in and out of Chicago and out of Marshalltown. It could haul more freight than it is now hauling with the same equipment. (R. 1640). It maintains eight pick-up and delivery trucks and about seven to ten semi-trailers in Des Moines at all times. At Omaha it keeps about six pick-up trailers and three or four semi-trailers at all times. (R. 1641).

It is rendering service on U.S. Highway 6 at the present time. It has never refused to render any service on Highway 6. It has teletype service between its various terminals. It interlines freight with other carriers at

Des Moines, Omaha, Chicago, and Tri-Cities. It solicits business and advertises for business and is continuously and constantly seeking to haul more freight. (R. 1641-1642).

The company is rendering a daily service from Chicago to Des Moines, from Des Moines to Chicago, from Des Moines to Omaha and from Omaha to Des Moines. From Omaha to Chicago there are some trucks that do not stop while other trucks stop at points on Highway 6. It has had no complaints with reference to the service it is rendering to intermediate points on U.S. Highway 6. (R 1644).

The company renders a daily service at Council Bluffs, Davenport and the Tri-Cities. (R. 1649). It has authority between Cedar Rapids and Omaha and conducts an operation between those points. (R. 1651).

It has not, in the last six months, had any calls for service on L.T.L. shipments of ordinary merchandise destined to the small towns on U.S. Highway 6 that it has refused to handle. In fact, it has guides out, and is soliciting business. (R. 1650).

If a sufficient volume of freight were tendered to this company to warrant the institution of the operation, it would be willing to establish a daily service to all points which it is authorized to serve on U.S. Highway 6, providing service on L.T.L. as well as volume shipments. (R. 1650).

The present competition between Chicago, Tri-Cities, Des Moines and Omaha includes Watson Bros. Transportation Co., Des Moines Transportation Company, Iowa-Nebraska Transportation Company, Carstenson Freight Line and there are some others. If the restriction is removed from the Rock Island Motor Transit Company it would have a big effect on his company's business. (R. 1650-1651).

Bos Truck Lines interlines with other carriers at Marshalltown, Cedar Rapids, Des Moines and Omaha, including Iowa-Nebraska Transportation, Rock Island Motor Transit, Des Moines Transportation Co., Roberts Transfer and others. (R. 1652).

A. W. HOBBS

(Record pp. 1665-1710)

Mr. Hobbs is Vice-President of the Des Moines Transportation Company, Inc. (R. 1665). The company presently operates approximately three hundred tractor-trailer units, with terminals located at Des Moines, Omaha, Mason City, Twin Cities, St. Paul, Chicago and Davenport. (R. 1666).

It operates a daily service between Chicago, the Tri-Cities, Des Moines and Omaha in both directions and conducts daily operations between the Twin Cities and Des Moines. (R. 1666).

It has interline arrangements at Des Moines with respect to shipments destined to Kansas City or St. Louis originating at the Twin Cities and is at present handling a substantial volume of traffic of that kind. The principal carrier with which it interlines at Des Moines for Kansas City is Knaus Freight Lines. With respect to St. Louis, Missouri, it interlines with various carriers. It interlines with other carriers at all of its terminals. (R. 1666-1667).

The company operates one or more trucks, depending on the tonnage, daily from Chicago to Omaha, Nebraska. From Chicago to Des Moines it operates several trucks daily. Except for straight load traffic, the Chicago-Tri-City shipments are loaded on a truck destined to points west of the Tri-Cities. It has a daily truck operation eastbound from Omaha to Chicago and a daily operation eastbound from Des Moines to Chicago. With respect to L.T.L. shipments originating at Chicago or delivered to

Des Moines Transportation by another carrier at Chicago destined to Iowa City, they are loaded on a road truck and delivered to Maher Bros. Transfer at Iowa City. This is a daily operation if there is freight. (R. 1670). A shipment originating at Chicago, or delivered to Des Moines Transportation Company, Inc., by another carrier at Chicago destined to Marengo would be loaded on a road truck at Chicago and delivered direct to the customer at Marengo. A similar shipment destined to Grinnell would be delivered to the Pasch Transfer at Grinnell for delivery. A similar shipment to Kellogg, Iowa, would be delivered direct from the road trailer. A similar shipment to Newton, Iowa, would be delivered to Merchants Transfer at Newton, Iowa. A similar shipment to Atlantic, Iowa, would be delivered to Smiley Transfer Company, and a similar shipment to Council Bluffs, Iowa, would be delivered out of the Omaha Terminal. (R. 1671).

For the purpose of showing representative types of shipments, witness Hobbs produced Manifest Sheets for the months of January and February, 1951 and for the same months in the year 1952. These sheets were available in the hearing room. (R. 1673). The witness picked at random two of the Manifest Sheets for the month of January, 1951, two for the month of February, 1951 and two for January, 1952 and two for February, 1952. Exhibits 37, 38, 39 and 40, (R. 1979-1982), are Manifest Sheets typical of the type of shipments which are handled by this company from Chicago to points located on U.S. Highway 6 which it is authorized to serve. (R. 1674). It is their practice to accept small L.T.L. shipments for delivery at these points. As a matter of fact, 81% of the total of them average less than 600 pounds. (R. 1675).

Witness selected five Manifest Sheets for the year 1951 and five for the year 1952 at random, which refer to shipments handled by Des Moines Transportation Com-

pany between Des Moines and the Davenport Terminal. They are handled on a truck moving from Des Moines eastward which peddles on the return trip. In other words, it peddles to points they are authorized to serve on Highway 6. Manifest Sheet bearing heading Des Moines Transportation Company from Des Moines to Davenport January 10, 1951 is Exhibit 41. Exhibit 42 is a similar Manifest Sheet dated January 4, 1951. Exhibit 43 is a similar Manifest Sheet bearing date of February 3, 1952 and Exhibit 44 is a similar Manifest Sheet bearing date February 19, 1952. (R. 1676-1678, 1983-1990).

Exhibit 45 dated February 5, 1951, Exhibit 46 dated February 1, 1951, Exhibit 47 dated January 27, 1952 and Exhibit 48 dated February 5, 1952, are manifests on trucks that moved on Highway 6 that had deliveries to the towns of Kellogg and Marengo. This is a movement east from Des Moines. (R. 1679).

With respect to all points that the Des Moines Transportation Co. is authorized to serve on Highway 6 it is rendering a daily service or substantially daily service to every point on every shipment irrespective of the type, except for the point Adel which is not involved in this application. There is a carrier that serves Adel from Des Moines. In fact, there are several. (R. 1684).

In the event there was a curtailment or an abandonment of any existing transportation service which is available to the public to points located on Highway 6 it would be willing to file an application for authority to provide a daily peddle service to all points on Highway 6 and, if such authority were granted, it would be willing to perform the service. This would also be true insofar as intrastate traffic is concerned. It would attempt to get that type of authority. (R. 1686-1687).

The company is willing to accept interline freight at Davenport from other carriers destined to points on U.S. Highway 6 which it is authorized to serve, and that is

true with respect to any type or weight of shipment. (R. 1687).

A L.T.L. shipment picked up in the Twin Cities today would arrive in Des Moines tomorrow and be delivered to a point served on U.S. Highway 6 the next day. The same would be true with an interline shipment from Kansas City, if it were received today by 3:30, which is the cut-off time. It would be loaded out tonight for points on U.S. 6. From Chicago to such points as Marengo and other points, other than Des Moines and the Tri-Cities, shipments would be loaded on a truck at Chicago late tonight and peddled, for example, at Marengo direct tomorrow. (R. 1687-1688).

There is a lot of competition between Chicago and Omaha including, On Time, Watson Bros. Transportation Company, Red Ball Transportation Company, Merchants Motor Freight, Rock Island Motor Transit, I.T.I. and Union. It is fair to say at least five or six substantial carriers are coming into Des Moines from Chicago. There are more than five substantial carriers from Minneapolis to Des Moines. (R. 1688).

If the restrictions were lifted from the Rock Island Motor Transit Company, that company would be the very highest type competitor and it would have an effect upon business. If Rock Island is limited to an auxiliary and supplemental service to train service with key-point restrictions preventing through operations from Chicago to Des Moines, and from Chicago to Omaha by motor carrier, it would not be as competitive from an operational standpoint. (R. 1688-1689).

Tonnage-wise about 50% of Des Moines Transportation Co. traffic is interline traffic. Shipment-wise about 46%. (R. 1707). It interchanges with Iowa-Nebraska Transportation Company and other carriers. No claims have been called to its attention regarding Iowa-Nebraska Transportation Company. (R. 1708).